Supreme Court, U.S.
FILED

No. 09-373 SEP 22 2009

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In The

Supreme Court of the United States

SHAWN HALLINAN AND WAYNE HAREJ,

Petitioners,

v.

FRATERNAL ORDER OF POLICE CHICAGO LODGE 7 and FRATERNAL ORDER OF POLICE ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether public sector employees required by a collective bargaining agreement, under color of state law, to pay dues to and bargain through a state public sector union necessarily have right under the Constitution to be members of such a union if they obey its reasonable rules and regulations?

2) Whether public sector employees may assert a claim enforcing such constitutional rights under the First and Fourteenth Amendments in the absence of any other remedy?

3) Whether state action is present where Illinois law grants a union the right to exclusively represent employees within a bargaining unit and requires those same employees to financially support the union?

4) Whether a state public sector union can expel from its membership employees it represents for the alleged offense of bringing the union into disrepute through criticizing their political opponents in a union election, without a fair hearing, and in retaliation for the exercise of their First Amendment rights?

PARTIES

Petitioners Shawn Hallinan and Wayne Harej are natural persons and citizens of the United States and the State of Illinois. They are former members of respondent Fraternal Order of Police Lodge 7 ("FOP Lodge 7") and are currently members of a bargaining unit exclusively represented by FOP Lodge 7. They are required, as a term of their employment by the State of Illinois, to financially support FOP Lodge 7.

Respondent FOP Lodge 7 is a labor organization and the exclusive representative of over 11,000 Chicago police officers, including petitioners. Respondent Fraternal Order of Police Illinois ("FOP Illinois") is a labor organization with oversight authority over FOP Lodge 7.

CORPORATE DISCLOSURE STATEMENT

Petitioners are both natural persons and citizens of the United States.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on June 25, 2009, and is attached hereto at App. 1-19. The United States District Court for the Northern District of Illinois dismissed the case in a Memorandum Opinion and Order on August 24, 2006, on a motion to dismiss. App. 20-31. The district court issued a final appealable order on September 19, 2006. App. 32.

JURISDICTION

The court of appeals judgment was entered on June 25, 2009. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Public Labor Relations Act, 5/ILCS 315/6(c)

A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act. A public employer is required upon request to furnish the exclusive bargaining representative with a complete list of the names and addresses of the public employees in the bargaining unit, provided that a public employer shall not be required to furnish such a list more than once per payroll period. The exclusive bargaining representative shall use the list exclusively for bargaining representation purposes

and shall not disclose any information contained in the list for any other purpose. Nothing in this Section, however, shall prohibit a bargaining representative from disseminating a list of its union members.

Illinois Public Labor Relations Act, 5/ILCS 315/6(e)

When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3(g), but not to exceed the amount of dues uniformly required of members. The organization shall certify to the employer the amount constituting each nonmember employee's proportionate share which shall not exceed dues uniformly required of members. In such case, the proportionate share payment in this Section shall be deducted by the employer from the earnings of the nonmember employees and paid to the employee organization.

Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(1)

Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

STATEMENT OF THE CASE

This case presents the important unresolved constitutional question of whether state law may require state public sector employees to be members of, and financially support a union, without any right to be a member of, and participate in that same union. Private sector employees are given this right by the Labor-Management Reporting and Disclosure Act ("LMRDA"), but state public sector employees have no such right, and as such, the serious First Amendment freedom of association issue, which the LMRDA allows this Court to avoid in the private sector, is present here.

In this case, this Court may not avoid the broader constitutional question because there is no such statutory protection. The parties in this case agree, and the court of appeals assumed, that Illinois

provides no such statutory right to membership and participation in a union with a union which employees must bargain through and financially support. The petitioners acknowledge that such a union must be allowed to control its membership through reasonable internal rules, but those rules must be subject to the constraints of due process, and at any rate, they must have the right to membership and participation in the union to begin with. This Court should grant *certiorari* to this case to address this important constitutional issue.

Factual and Procedural History

Petitioners are two long-time Chicago police officers, and were long-time members in good standing of Fraternal Order of Police Lodge 7 ("FOP Lodge 7") until they were suspended and ultimately expelled from the union by the very officers they campaigned against in the previous election. App. 36. A little over one month after losing the election (in which they received over forty percent of the vote), FOP Lodge 7 served the petitioners with disciplinary charges. App. 39. The basis of the charge against Petitioner Hallinan was his public criticism, during the campaign, of the incumbent president's under-reporting of his salary and failure to conclude contract negotiations with the city. App. 40, 65-68. Petitioner Harej was also charged on the basis of his criticism on the under-reporting of salaries by the incumbent officers, and of criticism of those same

officers, whom he was campaigning against, in the media. App. 40, 54-65.

Roughly three months later, in July of 2005, FOP Lodge 7 held a discipline hearing on the charges brought against the petitioners. App. 40. That panel suffered from severe irregularities including refusing to swear in witnesses, and, most egregiously, the panel was composed solely of persons who campaigned with the incumbent president and against the petitioners. App. 40-41. The petitioners objected to the composition and requested that the conflicted members recuse themselves. App. 41. The conflicted members refused to recuse themselves, and ultimately recommended that the petitioners be expelled from the union. Unsurprisingly, the FOP Lodge 7 Board, comprised of the petitioners' political rivals, voted to expel the petitioners over their objections and recusal requests on September 6, 2005. App. 41.

The petitioners appealed the discipline to FOP Lodge 7's superior organization, the Fraternal Order of Police of Illinois ("FOP Illinois"), which held a hearing on December 2, 2005. App. 36. That three member panel included two officers who had run on the same political slate as the incumbent president of FOP Lodge 7, i.e., they had campaigned against the petitioners. App. 42. That panel considered only the issue of whether the petitioners had received due process. App. 41. That panel recommended that the Board of Directors of the FOP deny petitioners' appeal of their discipline, which it did in an

unreasoned opinion. App. 42. This despite the fact that its own rules require it to justify its decision. App. 42.

Petitioners continued to pay full dues to FOP Lodge 7 until September of 2005, at which time FOP Lodge 7 requested that the City of Chicago begin deducting only the petitioners' "fair share" fees, despite the attempts of petitioners to continue to pay full membership dues. App. 42-43. While they continue to serve the citizens of Chicago as police officers, FOP Lodge 7, their exclusive representative in their employment by the city, denies them the right to participate in its governance, or even to be members in their union. Furthermore, they were never provided a hearing which could satisfy the requirements of due process.

Judicial Proceedings Below

Petitioners filed a four-count complaint in the United States District Court for the Northern District of Illinois the following spring, alleging violations of their rights under the First and Fourteenth Amendments to the United States Constitution, as well as the denial of their associational rights under state law, and "unfair representation" under state law. App. 44-52. The district court dismissed the constitutional counts on the basis that petitioners failed to plead state action. It dismissed the state law claims for want of jurisdiction.

Petitioners appealed, and presented five issues, including,

> 1. Whether a union like the [FOP] acts under color of law when it refuses to let [petitioners] join or associate with the union but requires them to support it financially under an agreement with the governmental employers, the City of Chicago?

And,

> 4. Whether the Illinois law that makes the FOP the exclusive representative of [petitioners] makes the FOP a state-sponsored compulsory association which acts under color of state law and may not deny or punish plaintiffs for speech protected by the First Amendment and which may not punish or expel them in a manner that violates the Due Process Clause of the Fourteenth Amendment, so long as plaintiffs comply with the reasonable rules and regulations of the FOP?

The court of appeals affirmed the district court's dismissal on the basis that "plaintiffs failed to plead adequately state action." App. 19. The appeal largely hinged on the appellate court's application of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and it is in this application that the court of appeals erred.

While the court of appeals conceded that the petitioners were, "certainly correct that when a government employer forces its employees to join a

union it is imposing on associational rights," it erroneously resolved the issue of state action by citing to *Messman v. Helmke*, 133 F.3d 1042 (7th Cir. 1998) for the proposition that "union actions taken pursuant to the organization's own internal governing rules and regulations are not state actions." App. 10-11. That reasoning failed to address the central point of the petitioners' appeal:

> *State law requires [petitioners] not only to support the FOP Lodge 7 but to act exclusively through FOP Lodge 7 to affect their own terms and conditions of employment.* If a union acting under this state-conferred monopoly chooses to bar plaintiffs for illegitimate and retaliatory purposes from attending meetings or participating in its business, such conduct is subject to constitutional scrutiny. (emphasis added) App. 37.

Statutory Framework and Constitutional Questions

Illinois granted FOP Lodge 7 the exclusive right to represent police officers like the petitioners in their relations and negotiations with their employer, the City of Chicago. 5 ILCS 315/6(c). Furthermore, over 11,000 Chicago police officers, including the petitioners, must financially support FOP Lodge 7, whether they are members or not. App. 37. This right is granted to FOP Lodge 7 by Illinois law. 5/ILCS 315/6(e).

ARGUMENT

Petitioners are not arguing that there is a constitutional right to join a union in the abstract. They argue only that where state law requires that they bargain through and financially support a particular union, they have a limited right to participate in and be members of that same union. In the absence of an effective alternative statutory right to such membership, they have a First Amendment right to that membership.

As part of promoting industrial peace, Illinois has passed a law infringing on the liberty of public sector employees to determine the terms of their employment and to decide with whom they will associate. In infringing on this liberty, Illinois authorized the creation of a monopoly in the labor market, a monopoly shielded from federal competition law. It authorized unions, upon a simple majority vote, to be the exclusive representative of every individual in a particular unit of employees. By operation of state law, employees are no longer at liberty to control the terms of their employment. 5 ILCS 315/6(c) takes this freedom away from the petitioners and gives it to the respondent union:[1]

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[1] 5 ILCS 315/6(e) further authorizes "union shop" clauses, wherein all employees must either be a dues-paying member of the union, or pay their "fair share" of its costs not related to political activities.

> (c) A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act.

Now, under color of Illinois law, a public sector employee can be forced to forego his liberty if a simple majority of his fellow employees voted themselves into power as his union – even if he personally despised them and objected to their representing him. What petitioners ask of this Court is to recognize that if they are required by law to allow FOP Lodge 7 to represent them, they should have a right to membership and participation in that same union, and that they have a claim or cause of action against that same union to enforce their rights.

I) Public sector employees who are required to bargain through, and financially support a union have a constitutional right to be members of, and participate in that same union.

Employees have the right to associate with whom they choose under the First Amendment, and, under the Fourteenth Amendment, a state, or as in this

case, an equivalent state actor, may not infringe upon that liberty without due process of law. This includes the liberty of choosing whom those employees collectively associate with to improve the conditions of their employment and to represent their rights against their employers. This freedom of association is of the instrumental kind, and as such is "an indispensable means of preserving other individual liberties" and is guaranteed by the Constitution. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

As allowed by state action, it is the union, not the employee, who negotiates his wages. It is the union, not the employee, who negotiates his hours of work. And while the union owes him the duty of fair representation in protecting these rights, it is only through participation within the union that the employee has a voice in deciding what the substance of these rights should be, and how they should be bargained with the employer. After this Court's holding in *14 Penn Plaza LLC v. Steven Pyett*, 129 S. Ct. 1456 (2009), the union may even bargain away the employee's right to enforce his statutory claims in a court of law. FOP Lodge 7 has all these rights, under color of law, in infringement on the liberty of the petitioners.

Congress permissibly infringed on this right of association when it authorized unions to be the exclusive representative of a unit of employees and when it authorized the "union shop." *See, e.g., Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks,*

Freight Handlers, Express and Station Employees, 466 U.S. 435, 455 (1984) ("[b]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree."); *see also, Hudson v. Chicago Teachers Union Local No. 1, AFT*, 743 F.2d 1187, 1193 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) ("forcing a public employee to support a union . . . deprive[s] him of 'liberty' within the meaning of the Fourteenth Amendment, and therefore requires the employer to give him due process of law," and, "[t]o join a union is to join an association engaged in the dissemination of ideas and opinions that may be controversial.").

While Congress, and Illinois, may infringe on employees' liberty in this manner, there must be appropriate safeguards. Congress recognized this fact and passed the "Union Bill of Rights" in the Labor-Management Reporting and Disclosure Act in 1959. Arguably, if it had not, this Court would have created a similar remedy, as it created the duty of fair representation and the "fair share" remedy, as described *infra*. The rights afforded employees against their union in the LMRDA are part of what allow the Constitution to suffer the infringements by the union shop on the liberties of employees. Indeed, the rights in the LMRDA were modeled on the rights in the First Amendment. *Reed v. United Transportation Union*, 488 U.S. 318, 326 (1989).

Illinois failed to provide similar protections for its state public sector employees. Without such protections, the broader question of whether the United States Constitution permits Illinois to infringe on the liberties of its public sector employees by requiring them to join and financially support a union of which they may disapprove is very much at issue. This Court may easily address, or more aptly, avoid addressing that issue by recognizing the necessary corollary to the rights granted by Illinois to its public sector unions – namely that employees have a right, limited by reasonable rules and regulations, to membership and participation in the unions that represent them, take their money, and infringe on their liberties.

II) State action is present in the relation between a union and its members where Illinois law grants the union the right to exclusively represent employees within a bargaining unit and requires those same employees to financially support it.

Under color of law, the respondent union infringes on the liberty of the petitioners, and police officers like them, to associate with whom they choose, and to represent themselves in their labor relations. As such, state action is present where FOP Lodge 7 expelled the petitioners in retaliation for their political activities. This expulsion violated the First and Fourteenth Amendments as it was performed without a fair hearing and in response to and in

infringement upon the petitioners' political activities. This is not to say the union can never infringe on its members' First Amendment rights – it can, so long as it provides due process and does not violate the equal protection clause.

In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), this Court upheld the constitutionality of a union shop clause. That decision recognized that Congress authorized union monopolies over representing employees' interests in order to promote industrial peace and stabilize labor-management relations. Importantly for this case, *Hanson* explicitly recognized that that the creation of a union shop is state action. As this Court noted in *Abood v. Detroit Board of Education*, 431 U.S. 209, 226 (1976):

> But, while the actions of public employers surely constitute "state action," the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in Hanson. The plaintiffs' claims in Hanson failed, not because there was no governmental action, but because there was no First Amendment violation.

As Justice Souter noted in dissent in *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457, 484 (1997), in commenting on *Abood*:

> In Abood, we recognized that even in matters directly related to collective bargaining, compulsory funding of union activities has an impact on employees' First Amendment interests, since the employees might disagree

> with positions taken by the union on issues such as the inclusion of abortion in a medical benefit plan, or negotiating no-strike agreements, or even the desirability of unionism in general.

In *Hanson*, the employees did not lose their case because of a lack of state action – they lost because there was no First Amendment violation. That is why petitioner's case demands a different result – there is a clear violation of the First and Fourteenth Amendments, which were lacking in *Hanson*, to go along with the state action that was present in that case. What is perfectly clear from *Abood* is that after *Hanson*, the union shop results from state action, and as such, the rights a union asserts under a union shop clause are state action. The court of appeals erred in this matter, and applied its own decision in *Messman* (actions of union taken under its own rules not state action) in a manner conflicting with this Court's decisions in *Hanson* and *Abood* (creation of union shop is state action). There was state action in this case because the union claims the right, under state law, to run a union shop and demand financial support from the petitioners.

III) Public sector employees may bring a constitutional claim in federal court to protect their rights against their union.

Illinois law infringes on the petitioners' important First Amendment right of freedom of association and deprives them of their liberty by

requiring that, as a term of their employment, they associate with and support FOP Lodge 7. Unlike the law applicable to the petitioners as state public sector employees, federal labor law provides that union members have the right to participate in the governance of their union. Section I of the Landrum Griffin Act, as amended and codified at 29 U.S.C. § 411(a)(1), states:

> EQUAL RIGHTS. – Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Congress also created a cause of action for individual union members to enforce this right. 29 U.S.C. § 412. Had congress not created these "equal rights," this Court would have been obliged to do so itself, in order to avoid a larger constitutional confrontation on the legitimacy of the right to exclusive representation afforded unions by Section 9 of the National Labor Relations Act, 29 U.S.C. § 159(a). *See, e.g., Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

These provisions are rational means for achieving legitimate goals and are laudable. However, they are not without their problems. This Court has twice

formed remedies to guard against the infringement of employees' important constitutional rights which are implicated by federal labor law. First, in response to discriminatory treatment of African-American engineers and trainmen, it created the Duty of Fair Representation. *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944); *see also, Turnstall v. Locomotive Firemen*, 323 U.S. 219 (1944); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Vaca v. Sipes*, 386 U.S. 171 (1967). Second, it created the category of "fair share" workers to prevent employees from being required to support political activity through union dues required as a term of their employment. *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

This Court has recognized that state action is involved in the creation of a union shop. *Abood*, 431 U.S. 226. Further, this action constitutes a "significant impingement on First Amendment Rights." *Ellis*, 466 U.S. 455. What petitioners ask is nothing more than what the Court did in *Steele* or *Beck* – to recognize a cause of action the absence of which calls into question the constitutionality of two cornerstones of labor-management relationships: exclusive representation and union shop clauses. Aside from creating a judicial remedy as it did in *Steele* and *Beck*, this Court retains original equity jurisdiction to hear claims enforcing constitutional rights, where Congress has not "clearly and convincingly" eliminated such

jurisdiction. *Marbury v. Madison*, 5 U.S. 137 (1803); *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Here, there was a deprivation of liberty without due process under the Fourteenth Amendment. Petitioners were longtime members of the union who became dissatisfied with the leadership, and made the decision to run for union office. After a race which saw them identify misreporting of salaries by the incumbents, and in which they won 43 percent of the vote in a losing effort, the same union officials they campaigned against, or political allies thereof, expelled them from the union. This Court should grant certiorari to adequately address this important unresolved constitutional question of how far the First Amendment must bend in accommodating labor-management relations in the state public sector.

IV) A public sector union violates the First and Fourteenth Amendments when it expels members for the alleged offense of bringing the union into disrepute through criticizing their political opponents in a union election, without a fair hearing, and in retaliation for the exercise of their First Amendment rights.

The facts in this case show how the lack of an express recognition of the right of state public sector employees to be members of and participate in their union opens the door to disastrous consequences. Here, two police officers campaigned against an entrenched union leadership they were dissatisfied

with. App. 38. In the petitioners' campaign, they truthfully criticized their opponents for failing to secure a contract and for under-reporting their officer salaries. App. 38-39. After losing the election, but securing over forty percent of the vote, the petitioners were disciplined and expelled from FOP Lodge 7, for making those truthful campaign statements. App. 38-42.

Yes, they were given notice of the charges against them, a hearing, and an appellate-style review hearing, but those hearings were before highly partisan tribunals composed of their political opponents and allies of their opponents and lacked other regularities such as the swearing-in of witnesses. App. 41-42. Due process requires an impartial decision maker. *See, e.g., Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972); *see also, International Association of Machinists and Aerospace Workers v. Metro-North Commuter Railroad*, 24 F.3d 369, 371 (2d Cir. 1994) ("At least since the time of Lord Coke (Nemo debet esse judex in propria causa – no one may be the judge in his own case.)"). In the absence of a statutory remedy, unions like FOP Lodge 7 may expel anyone who is seen as a political reformer or challenger, for any reason, before any tribunal.

This creates a constitutional injury to the petitioners in that their freedom to associate, guaranteed by the First Amendment, originally but permissibly taken by the State of Illinois when it granted the right of exclusive representation to unions like FOP Lodge 7, has once again been taken

by FOP Lodge 7, acting under color of state law. Where they still had limited rights to represent their own employment interests through (forced) association with FOP Lodge 7 while they were members, they now have zero rights in controlling and bargaining the terms of their own employment. Petitioners do not argue that the union could never expel a member – just that it must provide its members with a fair hearing, a fair hearing which they were denied. That lack of a fair hearing denied them due process in the taking of their important liberty interests.

CONCLUSION

Petitioners respectfully ask this Court to grant this petition for *certiorari* and review the decision of the court of appeals to address the important constitutional question of whether a state public sector union, whom a state has granted the right to exclusively represent and demand support from a unit of public sector employees, may, without a fair hearing and in retaliation for those members' intra-union political activities, expel its members without due process. In doing so, petitioners ask this Court to follow the precedents set by the *Steele* and *Beck* courts, and to recognize a right for state public sector employees equivalent to that set forth in the Landrum Griffin Act in order to avoid the more serious constitutional issues at stake if Illinois, and states like it, are allowed to mandate that its police

officers, as a term of their employment, financially support and be represented by an organization which they have no right to participate in and from which they may be expelled for no reason, or, as in this case, for malicious reasons.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 06-3602

SHAWN HALLINAN and WAYNE HAREJ,

Plaintiffs-Appellants,

v.

FRATERNAL ORDER OF POLICE OF CHICAGO LODGE NO. 7 and FRATERNAL ORDER OF POLICE OF ILLINOIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 C 2586 – **Joan Humphrey Lefkow**, *Judge*.

ARGUED APRIL 30, 2007 – DECIDED JUNE 25, 2009

Before ROVNER, WOOD, and SYKES, *Circuit Judges*.

ROVNER, *Circuit Judge*. After being expelled from their labor union, Chicago police officers Shawn Hallinan and Wayne Haraj sued the union and its parent organization for violations of their First and Fourteenth Amendment rights. The district court found that the plaintiff had failed to plead the state

action necessary to maintain an action pursuant to § 1983 and, consequently, the court granted the unions' motion to dismiss. We affirm.

I.

Plaintiffs Hallinan and Harej are long time City of Chicago police officers and were members in good standing of the City's police union, the Fraternal Order of Police Chicago Lodge No. 7 (FOP Lodge 7 or Union) until they were suspended in June 2005 and then expelled on September 6 of that same year. FOP Lodge 7 is a labor organization with the exclusive right to represent and bargain on behalf of police officers employed by the City. The Fraternal Order of Police of Illinois oversees FOP Lodge 7.

Both men were leaders of a group of Union members opposed to the FOP Lodge 7 president, Mark Donohue, and his political organization. During the March 2005 election cycle, Hallinan and Harej formed an opposition slate of twenty candidates to oppose President Donohue and the incumbent officers. During the course of the campaign, the plaintiffs uncovered evidence that Donahue had under-reported significantly his salary on a report filed with the Attorney General. Harej reported the discrepancy to the Attorney General's office and the FOP twice corrected the form. The under-reporting issue became a major one in the campaign and Hallinan and Harej discussed the error among Union members and publically, including with the media.

Soon after the March 25 election, Donahue and his slate members began proceedings to suspend and then expel both Hallinan and Harej from membership in the Union. On April 19, 2005, FOP Lodge 7 officers filed disciplinary charges against the two men and on June 25, while the charges were pending, suspended them. In July 2005, the FOP Lodge 7 held hearings regarding the disciplinary charges. Hallinan and Harej alleged in their complaint that the Union hearing panel was comprised of their political rivals. The panel recommended that the Union expel both plaintiffs, and on September 6, 2005, the FOP Lodge 7 board accepted the recommendation and voted to expel the two men.

The plaintiffs appealed the decision to the FOP Illinois. FOP Illinois held a hearing on the appeal and considered only whether the plaintiffs had received due process. The hearing panel's recommendation, which the FOP Board accepted, was to deny the appeal and uphold the plaintiffs' expulsion.

For unexplained reasons, Hallinan and Harej continued to pay full dues to the Union through an automatic payroll deduction mechanism until just after Hallinan and Harej filed a September 16, 2005 complaint with the Illinois Labor Relations Board (ILRB).[1] Because of that ILRB complaint, FOP Lodge

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[1] That complaint to the ILRB alleged that in expelling them as members, the Union violated its duty of fair representation to Hallinan and Harej. The Board dismissed the charges concluding that under Illinois law the duty of fair representation

(Continued on following page)

7 became aware that Hallinan and Harej, although expelled, were still paying full Union dues. In response, the Union, over the plaintiffs' objections, informed the City that it should make Hallinan and Harej fair-share payers – persons who make payments for activities essential to collective bargaining but who are not union members and do not pay membership dues. The City complied – rendering Hallinan and Harej fair-share payers and deducting the appropriate fair-share amount from their paychecks to send to the Union. Hallinan has offered and tendered payment of the amount of full Union dues to the FOP Lodge 7, but the Union has refused payment. FOP Lodge 7 currently receives Hallinan's and Harej's fair-share payments and continues to represent the two men in all matters concerning their wages, hours, and working conditions as police officers for the City of Chicago.

On May 9, 2006, Hallinan and Harej filed a complaint in the district court alleging First and Fourteenth Amendment violations pursuant to 42

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covered only the conduct of a labor union in collective bargaining and grievance handling and that the duty of fair representation did not extend to the right of union membership. The appeal before us is not from the ruling of the ILRB. This appeal arises from a separate suit, filed by plaintiffs in the district court below alleging federal constitutional and state law violations. We mention the proceedings before the ILRB only because it was the complaint in those proceedings that alerted the Union that the plaintiffs, although expelled, continued to pay full Union member dues.

U.S.C. § 1983 as well as pending state law claims for breach of the Union constitution and breach of the duty of fair representation. The suit named as defendants both the FOP Lodge 7 and the FOP Illinois. On August 24, 2006, the District Court granted the defendants' motion to dismiss, brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ruling that the court lacked subject matter jurisdiction as the plaintiffs had failed to plead adequately the state action necessary for maintaining an action pursuant to § 1983. (R. 41 p. 1). The court granted leave to the plaintiffs to amend the complaint to add allegations of illegal state action. When the plaintiffs declined to do so, the district court entered a final order on September 19, 2006, dismissing the case with prejudice. We review that decision *de novo*. *Richards v. Kiernan*, 461 F.3d 880, 883 (7th Cir. 2006).

II.

The plaintiffs in this case allege constitutional violations redressable through 42 U.S.C. § 1983. The First and Fourteenth Amendments to the Constitution protect citizens from conduct by the government, but not from conduct by private actors, no matter how egregious that conduct might be. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191, 109 S. Ct. 454, 461 (1988); *Messman v. Helmke*, 133 F.3d 1042, 1044 (7th Cir. 1998). Unions are not state actors; they are private actors. *Messman*, 133 F.3d at 1044. This does not end the matter, however,

because the conduct of private actors, in some cases, can constitute state action. Consequently, the outcome of this case depends on whether the conduct of the Union can be characterized as state or purely private action.

In order to be characterized as state action, "the deprivation [of constitutional rights] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible . . . [and] the party charged with the deprivation must be a person who may fairly be said to be a [S]tate actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2753-54 (1982). The Supreme Court has identified numerous situations when private conduct takes on the color of law. *See, e.g., id.* at 939, 102 S. Ct. at 2754-55; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295-96, 121 S. Ct. 924, 930 (2001). Private action can become state action when private actors conspire or are jointly engaged with state actors to deprive a person of constitutional rights, *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S. Ct. 183, 186 (1980); where the state compels the discriminatory action, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 1605 (1970); when the state controls a nominally private entity, *Pa. v. Bd. of Dirs. of City Trusts*, 353 U.S. 230, 231, 77 S. Ct. 806, 807 (1957); when it is entwined with its management or control, *Evans v. Newton*, 382 U.S. 296, 299, 301, 86 S. Ct. 486, 488, 489 (1966); when the state delegates a

public function to a private entity, *Terry v. Adams*, 345 U.S. 461, 484, 73 S. Ct. 809, 821 (1953); *West v. Atkins*, 487 U.S. 42, 56-57, 108 S. Ct. 2250, 2259-60 (1988); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 111 S. Ct. 2077, 2087 (1991), or when there is such a close nexus between the state and the challenged action that seemingly private behavior reasonably may be treated as that of the state itself. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974).

Over time, Supreme Court and Seventh Circuit precedent have revealed that these cases do not so much enunciate a test or series of factors, but rather demonstrate examples of outcomes in a fact-based assessment. *Brentwood*, 531 U.S. at 295, 121 S. Ct. at 930; *Tarpley v. Keistler*, 188 F.3d 788, 792 (7th Cir. 1999) ("All of the tests, despite their different names, operate in the same fashion: [ ] by sifting through the facts and weighing circumstances.").

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Brentwood Academy, 531 U.S. at 295-96, 121 S. Ct. at 930 (internal citation omitted).

Hallinan and Harej begin their argument by pointing out, correctly, that the existence of an exclusive union agency agreement with a government employer implicates the state action doctrine. *Chicago Teachers Union Local No. 1 v. Hudson,* 475 U.S. 292, 301, 106 S. Ct. 1066 (1986). Under the exclusive agency arrangement, a single labor organization has sole authority to bargain with a particular employer over wages, hours, and working conditions of employees. For employees, the unified bargaining agent provides strength in numbers and economies of scale. *See Tavernor v. Ill. Fed'n of Teachers,* 226 F.3d 842, 844 (7th Cir. 2000). For employers it protects them from conflicting demands of different groups of workers. Imagine the difficulties that would ensue if union A bargained for and received a different salary and set of benefits for its members than did union B. Giving exclusive bargaining rights to one particular union meets the needs of the union, the members it represents, and the employer. *See Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 221-22, 97 S. Ct. 1782, 1792 (1977) (outlining the problems with multiple representatives including inter-union rivalries, dissension in the work force, the undermining of the advantages of collectivization etc.). Consequently, the National Labor Relations Act (29 U.S.C. §§ 151-169) is premised on such a system of exclusive representation.

With all if its benefits, however, the exclusive agency agreement does come at a cost. When a government employer requires its employees to associate

with a particular private organization, it infringes on its employees' First Amendment associational rights and on liberty rights protected by the Fourteenth Amendment. *See Abood*, 431 U.S. at 222; *Hudson*, 475 U.S. at 301, 106 S. Ct. at 1073. The Supreme Court long ago resolved this problem by requiring employers to allow employees to opt out of union membership. *Abood*, 431 U.S. at 221-22, 97 S. Ct. at 1792. To prevent free riders from securing the benefits of collective bargaining without contributing to its cost, however, an employer may have a collective bargaining agreement with a union that requires employees who opt out of membership to contribute their fair share of the costs of collective bargaining. *Id.*; *Tavernor*, 226 F.3d at 844.

As the plaintiffs rightly point out, this forced association, even in the fair-share payer scenario, still imposes in some way on associational rights. *See Hudson*, 475 U.S. at 301, 106 S. Ct. at 1073; *Abood*, 431 U.S. at 222, 97 S. Ct. at 1793; *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1193 (7th Cir. 1984), *aff'd*, 475 U.S. 292, 106 S. Ct. 1066 (1986). It is possible, for example, that the union's leadership, in its negotiations over wages and benefits, strongly favors employer-sponsored retirement plans, but a particular fair-share payer believes in higher salaries without government sponsored retirement plans. Or perhaps the union is negotiating for a health plan that includes coverage for fertility treatment to which the employee is morally opposed. The fair-share payer may have no choice but to support

financially this bargaining activity (or, of course, wage the difficult battle for union de-certification). The imposition on associational rights, however, is lawful in that it goes no further than necessary to prevent the free-rider problem and ensure the smooth operation of the exclusive agency shop. *Hudson,* 743 F.2d at 1193-94. As the *Abood* court put it,

> To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment [of our precedent] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Abood, 431 U.S. 209, 222, 97 S. Ct. at 1793 (1977).

To sum up, the plaintiffs are certainly correct that when a government employer forces its employees to join a union it is imposing on associational rights. The plaintiffs argue that this is the mirror image of such a forced association case – "a reverse fair-share case" as they put it. But the reverse case of an *employer forcing* an employee to join a union is the case where the *employer prohibits* its employees from associating with a union. Clearly this too would constitute a violation of First Amendment associational rights, but it is not what happened here. Here, it was the Union, rather than the employer,

that barred the plaintiffs from membership. And union actions taken pursuant to the organization's own internal governing rules and regulations are not state actions. *Messman v. Helmke*, 133 F.3d 1042, 1044 (7th Cir. 1998); *see also Leahy v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 912 F.2d 917, 921-22 (7th Cir. 1990). Thus the simplistic "reverse fair share" moniker turns out to be inapt and we are thrust back to the initial question of whether something about this Union's relationship with the City turned what is generally private conduct into state action. That is, was the Union, for example, acting in concert or collusion with the City; was it acting with powers delegated to it by the City or state law; or somehow inextricably entwined with the City? In this case we conclude that it was not.

Hallinan and Harej appear to argue that because state action is present when a state employer forces employees to associate with a union, every action the union takes becomes action taken under color of law. "[G]overnmental regulation or participation in some of the affairs of unions," however, "does not consequently make every union activity so imbued with governmental action that it can be subjected to constitutional restraints." *Driscoll v. Int'l Union of Operating Eng'rs, Local 139*, 484 F.2d 682, 690 (7th Cir. 1973). If it did, state action could be assumed in every case involving a collective bargaining agreement between a union and a public entity, but our court and others have found otherwise. *See, e.g., id.* (finding no state action in internal union rule requiring all

candidates for union office to execute a non-communist affidavit); *Leahy,* 912 F.2d at 921-22 (finding that plaintiff failed to adequately allege state action in portion of suit against union representing employees of city employer); *see also Jackson v. Temple Univ.,* 721 F.2d 931, 933 (3d Cir. 1983) (plaintiff failed to satisfy state action requirement for claim against union representing employees of public employer). Rather, "the very activity of a private entity which a plaintiff challenges must be supported by state action." *Driscoll,* 484 F.2d at 690. Membership regulations and disciplinary procedures are quintessentially internal affairs. *See Messman,* 133 F.3d at 1044. In this case, no matter how they dress it, the plaintiffs are challenging only the Union's internal act of expelling them from membership in the organization. Even taking the facts of the complaint in the light most favorable to Hallinan and Harej, there is no evidence that the City exercised such coercive power, provided such significant encouragement, or was sufficiently entangled in any ways that the choice to expel the plaintiffs must, in law, be deemed to be that of the City. *See Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786 (1982).

The complaint in this case alleges that Union members filed disciplinary charges against Hallinan and Harej, that the Union suspended them before a hearing, that the Union conducted the hearings with biased panel members, and that the Union board ultimately voted to expel the plaintiffs. Hallinan and Harej further alleged that the Illinois FOP denied

their appeal and upheld their expulsion. The complaint does not allege that the City was in any way involved with the suspension or expulsion or hearing. Nor does it allege a conspiracy, compulsion, or delegation of duties. Indeed, the complaint alleges that the Union expelled the plaintiffs from their Union membership pursuant to the FOP Lodge 7's constitution and bylaws and not because of any provision in the collective bargaining agreement or any other agreement with the City. Regarding the City, the complaint merely alleges that the City requires the plaintiffs to support the Union and that the City assisted the Union by refusing to deduct the full amount of membership dues as the plaintiffs desire. (R. at 1, ¶¶ 10, 12, 54, 56).

The City's deduction of fair-share dues came about as a result of, and was not the cause of, the plaintiffs' expulsion. In fact, had the City done nothing at all and simply continued to deduct full membership dues and forward them to the Union, the plaintiffs would be in the exact same position as they are in now. The City could not compel the Union to accept the expelled members and the Union merely would be obliged to refund immediately any amount of over-payment. In response to the Union's expulsion, the City simply reacted by taking the required administrative steps to fulfill its ministerial obligations to deduct $X in dues for members and $Y in fees for fair-share payers. The City's deductions had no effect on whether the plaintiffs were expelled and will have no effect on whether the Union allows them

to re-join. Decisions about membership are between the Union and its police officer members. In this way, this case resembles the integral facts of *Blum,* 457 U.S. 991, 102 S. Ct. 2777 (1982). In *Blum,* private nursing homes independently determined that some of their residents did not require the level of care that they were receiving and consequently transferred those patients to a lower level of care. *Id.* at 995. The homes then notified the city officials who were responsible for administering the Medicaid program and ultimately the city adjusted the payments to the homes according to the level of care provided and the city's statutory obligations. *Id.* The Supreme Court concluded, "[t]hat the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties." *Id.* at 1005 (emphasis in original).

Hallinan and Harej admit that the City has not directly expelled the plaintiffs nor prevented their membership, but rather, they argue that the state action comes in the form of "non-obvious" involvement of the City. The non-obvious involvement stems largely from the language of the Collective Bargaining Agreement between the City and the FOP Lodge 7 which, in Section 3.1 states,

> A. Each officer who on the effective date of this Agreement is a member of the Lodge, and each officer who becomes a member after that date, shall, as a condition of employment,

maintain their membership in good standing in the Lodge during the term of this Agreement.

B. Any present officer who is not a member of the Lodge shall, as a condition of employment, be required to pay fair share (not to exceed the amount of Lodge dues) of the cost of the collective bargaining process and contract administration. All officers hired on or after the effective date of this Agreement and who have not made application for membership shall, on or after the thirtieth day following completion of their probationary period, also be required to pay a fair share of the cost of the collective bargaining process and contract administration.

(R. at 28, Ex. C, p. 2).

Hallinan and Harej interpret this language to mean that although new hires have the choice of becoming full members or simply fair-share payers, officers who were members on the effective date of the collective bargaining agreement can never subsequently opt-out and become fair-share payers. Consequently, the plaintiffs argue, any officer who is expelled from the Union can be (and theoretically must be) terminated by the City. This is neither a fair reading of the collective bargaining agreement nor constitutionally workable under the First Amendment. It could not be more clear that all persons "who object to nonrepresentational activities of the union have the right to pay fees that exclude contributions to those activities," and become fair-share payers.

Tavernor, 226 F.3d at 844; *see also Hudson,* 475 U.S. at 294, 106 S. Ct. at 1069; *Abood,* 431 U.S. at 234, 97 S. Ct. at 1799. It would be an odd reading of the contract indeed to allow only new hires and not long-standing employees to opt out of membership. Such a reading would mean that an employee who had been a member could never opt out of membership even if the Union began to pursue a political and ideological agenda with which the member disagreed. Suppose, for example, that the Union began to contribute to pro-choice causes to which the member was religiously opposed. Under the Union's reading, that member would be forced to maintain her association with a group to which she was ideologically opposed or lose her job. Such a forced association would undoubtedly violate the First Amendment as described in *Abood.* Not only would it be a stretch to read this first sentence of Section 3.2 as applying only to new hires, we need not. The language of that sentence contains no such restriction. Rather, that first sentence in subsection B is clear that "[a]ny present officer who is not a member of the Lodge shall, as a condition of employment, be required to pay fair share (not to exceed the amount of Lodge dues) of the cost of the collective bargaining process and contract administration." In other words any officer who is not a member – either by choice or due to expulsion – can and must become a fair-share payer, just as Hallinan and Harej have. "Terms that are lawful as written may not be given an illegal spin as part of an effort to curtail the obligation they create." *Cent. States, S.E. and S.W. Areas Pension*

Fund v. Joe McClelland, Inc., 23 F.3d 1256, 1258 (7th Cir. 1994).

The City cannot terminate the officers for non-compliance with Section 3.1; as fair-share payers, they have complied. The Union, therefore, does not have the power to have the officers terminated from their employment, as the plaintiffs allege. The decision to expel any member is regulated only by internal union regulations which are neither influenced nor compelled by the City or any other government agency. There is no entanglement, coercion, control, delegation, encouragement or any other indicia of state action. A state "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum,* 457 U.S. at 1004, 102 S. Ct. at 2786. The state does not govern the union's internal affairs.

What appears to be driving this appeal is the need to correct an injustice inflicted upon Hallinan and Harej. If their allegations are accurate – and for purposes of the motion to dismiss we accept all factual allegations in the complaint and draw all reasonable inferences from those facts in the plaintiffs favor (*Richards v. Kiernan,* 461 F.3d 880, 882 (7th Cir. 2006)) – Hallinan and Harej were expelled from the Union simply for challenging incumbent officers and exposing wrongdoing. It goes without saying that unions should tolerate and indeed

encourage dissension among their ranks and encourage whistle-blowing of nefarious and questionable practices by union leadership. The Constitution, however, does not require private organizations to provide free speech or due process rights to its members in matters concerning their purely private and internal affairs. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club,* 451 U.S. 287, 297, 101 S. Ct. 1775, 1781 (1981). Here, the Constitution requires state action which the plaintiffs have failed to effectively plead.

Federal Rule of Civil Procedure 12(b)(1) allows a party to move to dismiss a claim for lack of subject matter jurisdiction. A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. Although the district court ultimately concluded that it lacked subject matter jurisdiction because the plaintiffs had failed to plead the state action necessary for maintaining an action pursuant to § 1983 – a conclusion that invokes Fed. R. Civ. P. 12(b)(1) – the court should have instead dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Because the plaintiff properly pleaded a colorable claim arising under a law of the United States, the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 511, 126 S. Ct. 1235, 1244 (2006). Proof of state action, in contrast, is an element of the claim. *See id.*; *Lugar v.*

Edmondson Oil Co., Inc., 457 U.S. 922, 930, 102 S. Ct. 2744, 2750 (1982) (describing the state action requirement as an element of a § 1983 claim). Indeed, the defendant's motion to dismiss properly moved the court to dismiss for failure to state a claim under Rule 12(b)(6), alleging that the plaintiffs had failed to plead state action. Defendants moved to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) solely on the pendant state law claim.

The plaintiffs failed to plead adequately state action and thus the district court's grant of the defendants' motion to dismiss is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHAWN HALLINAN and WAYNE HAREJ,	)	
Plaintiffs,	)	
vs.	)	
FRATERNAL ORDER OF POLICE CHICAGO LODGE 7 and FRATERNAL ORDER OF POLICE OF ILLINOIS,	)	**No. 06 C 2586** **Judge Joan H. Lefkow**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

(Filed Aug. 24, 2006)

Plaintiffs Shawn Hallinan and Wayne Harej filed a four-count complaint against defendants Fraternal Order of Police Chicago Lodge 7 ("FOP Lodge 7") and Fraternal Order of Police of Illinois ("FOP Illinois"), alleging violations of their rights under the First and Fourteenth Amendments pursuant to 29 U.S.C. § 1983 and state law claims for denial of associational rights law and unfair representation. Before the court is defendants' motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P. For the reasons stated below, the court grants defendants' motion.

MOTION TO DISMISS STANDARDS

Rule 12(b)(1), Fed. R. Civ. P., provides that a case will be dismissed if the court lacks the statutory authority to hear and decide the dispute. The standard of review for a Rule 12(b)(1) motion to dismiss depends on the purpose of the motion. *See United Phosphorous, Ltd.* v. *Angus Ghent. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (*en banc*). If subject matter jurisdiction is not evident from the face of the complaint, the court analyzes the motion to dismiss under Rule 12(b)(1) as any other motion to dismiss and assumes for purposes of the motion that the allegations in the complaint are true. Where, as here, however, the complaint is formally sufficient but the contention is that there is in fact no subject matter jurisdiction, the movant may use affidavits and other materials to support the motion. The burden of proof on the Rule 12(b)(1) issue is on the party asserting jurisdiction. *Id.*

A motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted. *Gen. Elec. Capital Corp.* v. *Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997). Dismissal is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Kennedy* v. *Nat'l Juvenile Det. Ass'n*, 187 F.3d 690, 695 (7th Cir. 1999). In ruling on the motion, the court accepts as true all well pleaded facts alleged in the

complaint, and it draws all reasonable inferences from those facts in favor of the plaintiff. *Jackson* v. *E.J. Brach Corp.*, 176 F.3d 971, 977 (7th Cir. 1999); *Zemke* v. *City of Chicago*, 100 F.3d 511, 513 (7th Cir. 1996).

BACKGROUND[1]

Hallinan and Harej are police officers employed by the City of Chicago (the "City"). Shorty after becoming police officers, plaintiffs joined FOP Lodge 7, which is a labor organization with the exclusive right to represent and bargain on behalf of police officers employed by the City, including plaintiffs. FOP Illinois oversees FOP Lodge 7.

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[1] In resolving this motion to dismiss, the court will consider the complaint and its attached exhibits, the parties' briefs, plaintiffs' affidavits, and the collective bargaining agreement between FOP Lodge 7 and the City of Chicago to determine whether the court has subject matter jurisdiction. *See Sapperstein* v. *Hager*, 188 F.3d 852 at 855 (7th Cir. 1999) ("Where evidence pertinent to subject matter jurisdiction has been submitted, however, 'the district court may properly look beyond the jurisdictional allegations of the complaint . . . to determine whether in fact subject matter jurisdiction exists.'"), *quoting United Transportation Union* v. *Gateway Western Railway Co.*, 78 F.3d 1208, 1210 (7th Cir. 1996). The court will not consider plaintiffs' motion for a preliminary injunction and supporting memorandum of law, which plaintiffs purport to incorporate by reference in their response to defendants' motion to dismiss. Plaintiffs did not seek leave of the court to file a brief in excess of fifteen pages, *see* Local Rule 7.1, and, on its own, plaintiffs' response to defendants' motion to dismiss is fifteen pages.

Pursuant to its collective bargaining agreement (the "CBA") with the City, every person represented by FOP Lodge 7 must pay for its financial support. Section 3.1 of the CBA states:

> **Section 3.1 – Maintenance of Membership and Agency Shop.**
>
> A. Each officer who on the effective date of this Agreement is a member of the Lodge, and each officer who becomes a member after that date, shall, as a condition of employment, maintain their membership in good standing in the Lodge during the term of this Agreement.
>
> B. Any present officer who is not a member of the Lodge shall, as a condition of employment, be required to pay fair share (not to exceed the amount of Lodge dues) of the cost of the collective bargaining process and contract administration. All officers hired on or after the effective date of this Agreement and who have not made application for membership shall, on or after the thirtieth day following the completion of their probationary period, also be required to pay a fair share of the cost of the collective bargaining process and contract administration.

Plaintiffs' Exhibit C at 2.

On April 19, 2005, disciplinary charges were filed against plaintiffs pursuant to FOP Lodge 7's constitution and bylaws. Plaintiffs had run unsuccessfully for office in FOP Lodge 7's officer elections, and the disciplinary charges stemmed from plaintiffs' criticism of FOP Lodge 7's president, Mark Donahue, during the election. Plaintiffs had uncovered wrongdoing relating to Donahue's under-reporting of his salary on a report filed with the Illinois Attorney General and discussed this wrongdoing publicly during their campaigns. FOP Lodge 7 suspended Hallinan and Harej from its membership and barred them from union meetings prior to a hearing on the charges.

In July of 2005, plaintiffs attended a hearing on the charges against them. The hearing panel issued their recommendation to FOP Lodge 7 on September 6, 2005. The panel recommended that both plaintiffs be expelled from FOP Lodge 7. Accepting the panel's recommendation, the Board of FOP Lodge 7 voted to expel plaintiffs. Plaintiffs were expelled effective September 6, 2005.

Plaintiffs appealed the decision of the FOP Lodge 7 Board to FOP Illinois. On December 2, 2005, FOP of Illinois held a hearing on the appeal and considered only whether plaintiffs had received due process. The panel recommended that the Board of Directors of FOP Illinois deny the appeal and uphold plaintiffs' expulsion. The Board of FOP Illinois accepted the panel's recommendation.

Plaintiffs continued to pay their full dues until Hallinan filed a charge with the Illinois Local Labor Relations Board on September 16, 2005. Hallinan's charge disclosed that plaintiffs were continuing to pay their full membership dues. FOP Lodge 7 subsequently requested, without the consent of plaintiffs and over their objections, that the City make plaintiffs fair share payers. The City complied by rendering plaintiffs fair share payers and deducting the corresponding fair share payment from their paychecks. At the request of FOP Lodge 7, the City has refused the "check off authorization" signed by plaintiffs, which would authorize the City to deduct full union dues from their paychecks. Hallinan has offered and has tendered payment of the amount of full union dues to FOP Lodge 7, which FOP Lodge 7 has refused to accept. FOP Lodge 7 requires and receives plaintiffs' fair share payments and continues to represent plaintiffs exclusively in all matters concerning their wages, hours, and working conditions as employees of the City.

DISCUSSION

To withstand defendants' motion to dismiss, plaintiffs' complaint must allege facts establishing that FOP Lodge 7 and FOP Illinois were acting under color of state law when FOP Lodge 7 expelled plaintiffs and when FOP Illinois upheld the expulsion. *See*

42 U.S.C. § 1983.[2] As a private entity, a union is generally not a state actor and therefore does not act under color of state law. *Messman* v. *Helmke,* 133 F.3d 1042, 1044 (7th Cir. 1997). Nevertheless, a union or other private entity may be held liable under § 1983 by conspiring with the state to deny a plaintiff his or her rights, *see, e.g., Tarpley* v. *Keistler,* 188 F.3d 788, 791 (7th Cir. 1999), or by acting as "a willful participant in joint action with the State or its agents." *Leahy* v. *Bd. of Trustees of Community College District No. 508, County of Cook,* 912 F.2d 917, 921 (7th Cir. 1990). To qualify as state action, the conduct in question "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State responsible," and "the party charged with the [conduct] must be a person who may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). Plaintiffs have failed to meet these criteria.

According to the complaint and the charges filed against plaintiffs, defendants expelled plaintiffs from

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[2] Section 1983 states, in part:

> Every person who, under cover of any statute, ordinance, regulation, custom or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding fo redress. . . .

their union membership pursuant to the FOP Lodge 7's constitution and bylaws, and not pursuant to FOP Lodge 7's CBA with the City or any "right or privilege created by the State." *Id.* Plaintiffs argue that the City is profoundly engaged in the expulsion process by virtue of Section 3.1 of the CBA; however, the City had no involvement in the decision to expel plaintiffs or the process by which they were expelled from their membership in FOP Lodge 7. And Section 3.1, by its express terms, does not require police officers employed by the City to be members of FOP Lodge 7. It merely requires that police officers who are not members of FOP Lodge 7 pay fair share dues which plaintiffs are paying. Thus, the actions undertaken by defendants pursuant to FOP Lodge 7's constitution and bylaws to expel plaintiffs from their union membership do not constitute state action. *See United States* v. *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO,* 941 F.2d 1292, 1296 (2d Cir. 1991) (actions taken pursuant to a union's constitution are not state actions).[3]

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[3] In this regard, plaintiffs' reliance on "fair share" cases, *e.g., Abood* v. *Detroit Bd of Education,* 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), *Hudson* v. *Chicago Teachers Local No. 1 AFT,* 743 F.2d 1187 (7th Cir.), *aff'd* 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986), to establish that defendants were acting under color of state law are inapposite, in these cases, state action existed because the conduct about which the plaintiffs had complained, the involuntary deduction of full union dues from non-union members' paychecks by state actors, resulted from specific contractual provisions between the public employer and union. Here, however, plaintiffs' injury is their

(Continued on following page)

Plaintiffs also assert that state action exists by virtue of FOP Lodge 7's CBA with a public employer and the City's collecting of dues pursuant to the CBA, arguing that defendants have acted under color of state law by denying plaintiffs the right to associate with the very union that plaintiffs must pay to support.[4] To accept plaintiffs' assertion would be to find state action in any union action against an employee by virtue of the existence of a collective bargaining agreement with a public entity. As defendants argue, plaintiffs' assertion would eviscerate the distinction between public and private actors that was intended for Section 1983 claims. Moreover, such a result is contrary to the legal authority in this circuit. *See, e.g., Leahy,* 912 F.2d at 921 (7th Cir. 1990) (affirming dismissal of § 1983 claim against union where plaintiff claimed that the city had delegated its authority over the terms and conditions of plaintiff's

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expulsion from FOP Lodge 7 pursuant to FOP Lodge 7's internal constitution and bylaws.

[4] Plaintiffs further argue that there is a First Amendment right to be a union member in public employment, citing *Hilt* v. *Connell,* 301 F.3d 240, 245 (5th Cir. 2002). In *Hilt,* however, the 5th Circuit was considering whether a jury verdict finding in favor of a public employee's First Amendment retaliation claim was supported by the evidence, in particular, whether a motivating factor in the employee's termination in his termination. In reaching this issue, the court acknowledged that the First Amendment protects a public employee's right to associate with a union in that he or she cannot suffer adverse employment action for that association. *Id.* at 245-246. This case does not establish that unions cannot deny membership or otherwise expel members.

employment to the union pursuant to a collective bargaining agreement but where there were no allegations establishing that the union acted as a state instrumentality, performed traditionally exclusive sovereign functions, or been compelled or encouraged by the state to make the decisions challenged in the complaint). *See also Driscoll* v. *Int'l Union of Operating Engineers, Local 139,* 484 F.2d 682 at 690 (7th Cir. 1973) ("[G]overnmental regulation or participation in some affairs of unions does not consequently make every union activity so imbued with governmental action that it can be subjected to constitutional restraints.") (citations omitted).

In the alternative, plaintiffs argue that state action is present because the City, which is not a party to this lawsuit, reduced plaintiffs to an involuntary fair share status. The relevant inquiry is "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 at 351, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 (1974). Such a close nexus is absent in the present matter because the City did not participate in the decision to expel plaintiffs from FOP Lodge 7; rather, FOP Lodge 7 acted pursuant to its internal constitution and bylaws. The City merely deducted fair share dues, rather than full dues, from

plaintiffs' paychecks.[5] As defendants note, even if the City were to resume deducting full dues from plaintiffs, plaintiffs would not become members of FOP Lodge 7 because the City has no control over whom defendants accept as members. Thus, the City did not cause plaintiffs' injury or otherwise encourage FOP Lodge 7's decision to expel plaintiffs, and defendants' expulsion of plaintiffs from FOP Lodge 7 fails to constitute state action. *See Driscoll,* 484 F.2d at 690 ("To be regulable under constitutional standards through [28 U.S.C.] § 1331 or § 1983, the very activity of a private entity which plaintiff challenges must be supported by state action . . . that significantly fosters or encourages that activity.") (internal citation omitted). *See also Int'l Bhd. of Teamsters,* 941 F.2d at 1296, *quoting Powe* v. *Miles,* 407 F.2d 73, 81 (2d Cir. 1968) ("[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that *caused* the injury.") (emphasis in original). Because plaintiffs have failed to plead the state action necessary for maintaining an action pursuant to § 1983, the court lacks subject matter jursidiction

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[5] Plaintiffs argue that the City has stopped Hallinan and Harej from associating with or supporting FOP causes by virtue of the City's deduction of the fair share amount rather than full dues from plaintiffs' paychecks. Again, however, it is plaintiffs' expulsion from the union rather than the City's deduction of dues from plaintiffs' paychecks that precludes plaintiffs from utilizing FOP Lodge 7 as a conduit for supporting FOP Lodge 7's causes.

over this suit and must grant defendants' motion to dismiss.[6]

ORDER

For the reasons stated above, the court grants defendants' motion to dismiss [#27] without prejudice to plaintiffs' filing an amended complaint within twenty days of this order, if they are able to do so. If plaintiffs fail to file an amended complaint within twenty days, the dismissal will be with prejudice.

ENTER: /s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW
United States District Judge

DATED: August 24, 2006

[6] Having determined that plaintiffs have failed to plead the requisite state action necessary to maintain their § 1983 claims, the court declines to exercise its pendent jurisdiction over plaintiffs' state law claims and reaches no decision and offers no opinion as to defendants' remaining arguments.

United States District Court
Northern District of Illinois
Eastern Division

Hallinan, et al.

v.

Fraternal Order
of Police, et al.

JUDGMENT IN A CIVIL CASE

(Filed Sep. 19, 2006)

Case Number: 06 C 2586

☐ Jury Verdict. This Action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed with prejudice, nunc pro tunc September 13, 2006, plaintiffs having failed to file amended complaint as directed.

Michael W. Dobbins,
Clerk of Court

Date: 9/19/2006

/s/ Michael Dooley,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHAWN HALLINAN AND WAYNE HAREJ,	)	
Plaintiffs,	)	
v.	)	
FRATERNAL ORDER OF POLICE CHICAGO LODGE 7 and FRATERNAL ORDER OF POLICE OF ILLINOIS,	)	
Defendants.	)	JURY DEMANDED.

COMPLAINT

(Filed May 9, 2006)

I. INTRODUCTION

1. Plaintiffs Shawn Hallinan and Wayne Harej sue defendant Fraternal Order of Police Chicago Lodge 7 and Fraternal Order of Police of Illinois for unlawfully excluding or barring the plaintiffs from membership or any other way of participating in the affairs of a labor union for which they are obligated to pay financial support and which has the exclusive right to represent them with the City of Chicago. In violation of the FOP Chicago Lodge Constitution and by-laws and in violation of any fair or impartial trial procedure, the defendant organizations unlawfully expelled plaintiffs from membership. They did so, not for violation of any reasonable rule or regulation of

the defendant organizations, but for whistle-blowing activity and other speech activity protected by the First Amendment. Defendant organizations unlawfully expelled plaintiffs for disclosing to the Illinois Attorney General as well as to the media and the FOP membership generally that defendant Donahue, who is president of the FOP Chicago Lodge 7, had given false statements to the Illinois Attorney General in an annual charitable organization report which defendant FOP Chicago Lodge 7 was at that time obligated by law to file. Furthermore, defendants also expelled plaintiffs because Hallinan and Harej ran for the offices of president and secretary of FOP Chicago Lodge 7 in the officer election of March 2005, and otherwise spoke out and engaged in their rights to free speech. Defendants thereby sought to ensure that plaintiffs could not run for office again or associate with other members of FOP Chicago Lodge 7 and engage in further political opposition to Donahue and other incumbent officers and to chill all legitimate political opposition by the union membership. Finally, defendants expelled the plaintiffs in a manner that denied plaintiffs a neutral or fair and impartial tribunal to hear the charges filed against them and that denied other basic norms of due process. Pursuant to 42 U.S.C. § 1983, plaintiffs Hallinan and Harej seek damages and injunctive relief for violation of their First Amendment rights to engage in free speech, to associate with other FOP members, and to petition law enforcement authorities such as the Illinois Attorney General to investigate union misconduct. Furthermore, plaintiffs seek

damages for the violations of their rights under the Fourteenth Amendment to due process and equal protection. Plaintiffs also bring claims under Illinois state law for unlawful deprivation of their contractual right to membership in an association and for violation of their contractual rights under the constitution and by laws of these organizations.

II. PARTIES

2. Plaintiff Shawn Hallinan is a Cook County Illinois resident and a police officer employed the City of Chicago and a wrongfully expelled member of FOP Chicago Lodge 7.

3. Plaintiff Wayne Harej is a Cook County Illinois resident and a police officer employed by the City of Chicago and a wrongfully expelled member or FOP Chicago Lodge 7.

4. Defendant Fraternal Order of Police Chicago Lodge 7 (FOP Lodge 7) is a labor organization with the exclusive right to represent and bargain in behalf of plaintiffs and other police offices employed by the City of Chicago.

5. Defendant Fraternal Order of Police of Illinois State Lodge is an organization with its principal office in Illinois and with responsibility for oversight of FOP Lodge 7.

III. JURISDICTION

6. Plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1343 as to the federal claims in Counts I and II They invoke 28 U.S.C. § 1367 as to the supplemental state law claim in Counts III and TV. Plaintiffs also seek their legal fees and costs pursuant to 42 U.S.C. § 1988.

7. Venue lies in this judicial district both because all parties reside here and most of the actions set forth below took place in this judicial district, 28 U.S.C. § 1391(b)(2).

IV. FACTS

8. Since July 5, 1994, plaintiff Hallinan has been employed as a police officer by the City of Chicago and became a member of the FOP Lodge 7 shortly thereafter. He was continuously in good standing as an FOP Lodge 7 member until wrongfully suspended on or about April 19, 2005 and expelled on September 6, 2005.

9. Since July 26, 1971, plaintiff Harej has been employed us a police officer by the City of Chicago; he became a member of the FOP Lodge 7 shortly thereafter. He was continuously in good standing as an FOP Lodge 7 member until wrongfully suspended on or about April 19, 2005 and expelled on September 6, 2005.

10. As a condition of their employment plaintiffs are obligated to be union members unless they

voluntarily withdraw and pay a fair share of the costs of representation by FOP Lodge 7.

11. The collective bargaining agreement between the City of Chicago and the FOP Lodge 7 provides that every person represented by FOP Lodge 7 is obligated to pay for the financial support of the FOP Lodge 7.

12. The City of Chicago deducts the full membership dues of approximately $18.00 from each paycheck of a police office and remits the amount to FOP Lodge 7 and otherwise enforces the plaintiffs' obligation to be members of FOP Lodge 7 and to deal with the City of Chicago exclusively through the medium of their union membership.

13. As such, plaintiffs have no right to enter any individual agreement with the City of Chicago and may not deal directly with the City of Chicago in matters concerning their wages, hours and working conditions, but only through their participation in the internal affairs of FOP Lodge 7.

14. Since the time of their employment up until their expulsion in 2005, the plaintiffs were active and involved members of FOP Lodge 7 and participated in activities affecting their wages, working hours and conditions through their membership in FOP Lodge 7.

15. As union members, plaintiffs sought to improve the quality and effectiveness of union representation as the exclusive means by which they could deal with the City of Chicago as their employer.

16. Plaintiff Hallinan was elected to the office of trustee of the FOP Lodge 7 in March 2002.

17. Plaintiff Harej was elected as a union representative (a position similar to shop steward) in 1996 and 1999, and then again in 2005.

18. In the officer election of March 11 2005, plaintiffs Hallinan and Harej decided to run as candidates for union office as president and financial secretary respectively.

19. In the election, plaintiff Hallinan and plaintiff Harej got approximately 44 percent and 41 percent of the vote respectively.

20. During the election plaintiffs uncovered wrongdoing by the defendant FOP Lodge 7 president Mark Donahue relating to gross underreporting of Donahue's salary on a report filed with the Illinois Attorney General.

21. At that time FOP Lodge 7 was obligated to file a form known as AG-990 which is a report that every acknowledged charitable organization must file with the Illinois Attorney General.

22. The report requires the disclosure of the salaries of the organization's employees.

23. Mark Donahue reported a salary of $53,000 on the form AG-990 when he was receiving over $138,000 a year.

24. In December 2004 plaintiff Harej complained internally in the FOP to correct the underreporting of Donahue's salary.

25. In December 2004 plaintiff Harej then filed a charge with the Illinois Attorney General when FOP Lodge 7 failed or refused to correct the underreporting.

26. On or around February 22, 2005 the Lodge filed an amended return but still underreported Donahue's salary as being only $68,000

27. Plaintiffs Hallinan and Harej went to roll calls to discuss the underreporting by Donahue and sent out a newsletter and also spoke with the media to get out the message to the FOP membership generally.

28. Plaintiff Hallinan spoke with reporters with the Chicago Sun Times and other papers about this matter and also criticized the action of Donahue for failing to negotiate and reach a new collective bargaining agreement in a timely manner.

29. On March 11, 2005 plaintiffs lost the election.

30. On April 19, 2005 at a general union meeting the recording secretary Sid Davis presented or served disciplinary charges which had been filed against plaintiffs. The charge against Harej was filed by Bella, and the charge against Hallinan was filed by Tim Fallon.

31. The charge against Harej was based on Harej's filing or the charge with the Illinois Attorney General over Donahue's underreported salary and on his criticism of the union officers in the media and on certain oppositional activities by Harej. A copy is attached as *Exhibit A* to this Complaint.

32. The charge against Hallinan was based on Hallinan's public criticism of the underreporting of Donahue's salary and or Donahue's failure to conclude a collective bargaining agreement. A copy of the charge is attached as *Exhibit B*.

33. Even before a hearing on the charges, or even before a hearing was scheduled, the FOP Lodge 7 suspended Hallinan and Harej from union membership and barred them from union meetings.

34. Two days after the June 2005 union meeting the FOP notified plaintiffs that even prior to a hearing on the charges, they were suspended.

35. In July 2005 plaintiff Harej had a hearing on the charge against him.

36. In July 2005 plaintiff Hallinan had a hearing on the charge against him.

37. The hearing panel consisted only of members or Donahue's slate who ran with Donahue in the election and ran against the two plaintiffs.

38. Donahue picked the panel to include only the plaintiffs' political rivals.

39. Because they had been running for office in March 2005 on the same slate with Donahue, the panel members themselves were adversely affected or implicated in the very criticism of Donahue which was the subject of the charges.

40. Plaintiffs protested the composition of the panel and the impartiality of the panel and pointed out their conflict of interest, but the panel members refused to recuse themselves.

41. The panel members also refused to swear in witnesses, contrary to the usual procedure of such internal FOP tribunals.

42. On September 6, 2005 the trial panel made their recommendation to the FOP Lodge 7 Board that both plaintiffs be expelled.

43. The FOP Lodge 7 Board voted, not unanimously, to expel plaintiffs, and they were expelled as of September 6, 2005.

44. Plaintiff Hallinan had asked the entire FOP Lodge 7 Board to recuse itself but was denied.

45. Plaintiffs then appealed the action of FOP Lodge 7 to the FOP of Illinois, the state organization which supervises FOP Lodge 7.

46. On December 2, 2005 a panel of the FOP of Illinois held a hearing on the appeal.

47. The panel of the FOP of Illinois refused to consider any issue except whether the plaintiffs had received due process.

48. Two of the three panel members who considered the plaintiffs' claim of failure to receive due process and of lack of impartiality had served with Donahue as fellow officers of the State Lodge during his presidency. They had run with Donahue on his candidate slate for these positions.

49. The panel recommended that the Board of Directors of the FOP of Illinois deny the appeal and uphold the expulsion of plaintiffs. The Board did so, but gave no reason for its action, though a reason of some kind is required by the rules.

50. Plaintiffs have adequately exhausted their internal organizational remedies.

51. Plaintiffs were paying full dues until plaintiff Hallinan filed a charge with the Local Labor Relations Board on September 16, 2005. The charge disclosed that plaintiffs were continuing to pay full membership dues.

52. Shortly thereafter and over plaintiffs' objection the FOP Lodge 7 requested the City Of Chicago to make them fair share payers without their consent and to assist in their expulsion from the union.

53. Until requested in the case of plaintiffs, the City of Chicago has never made an employee a fair share payer without his consent or injected itself in this manner to assist the FOP Lodge 7 in expelling plaintiffs from union membership.

54. The City of Chicago has refused the check off authorization signed by plaintiffs at the request of FOP Lodge 7.

55. Plaintiff Hallinan has offered and has tendered payment to FOP Lodge 7 of his full union dues amount but the FOP Lodge 7 has refused to accept such dues in order to bar plaintiffs from the union.

56. However FOP Lodge 7 has continued to require and take plaintiffs' fair share amounts under the terms of its agreement with the City of Chicago so as to create a new type of employment status, *i.e.*, the "involuntary" fair share payer who is compelled by the City of Chicago and Union to pay fair share but, barred by the City and Union from tendering their full union dues; and in this manner, the City of Chicago has further assisted in plaintiffs' unlawful exclusion from their union.

57. Plaintiffs filed a grievance with the City of Chicago for making them fair share payers without their consent and for cooperating with and assisting FOP Lodge 7 in their expulsion from the union.

58. By operation of state law the FOP Lodge 7 continues to represent plaintiffs exclusively in all matters concerning their wages, hours and working conditions as employees of the City but unlawfully refuses to let plaintiffs associate with other police officers or have anything to do with the organization.

COUNT I

(Section 1983: Violation of First Amendment)

59. Plaintiffs incorporate paragraphs 1 through 58.

60. By the acts set forth above, and by continuing to force plaintiffs to support FOP Lodge 7, but to deny them any membership or connection to it and to do so at the same time that the City of Chicago extracts financial support from plaintiffs for an organization they may not join, the defendant FOP Lodge 7 and defendant FOP of Illinois have violated their obligation to admit to membership any eligible employee including plaintiffs who must pay to support FOP Lodge 7 and wishes to associate with other members of any organization they are obligated by State Action to support.

61. By the acts set forth above, and by expelling the plaintiffs in the first place because they disclosed misconduct by the officers of FOP Lodge 7 and uncovered the false statements of such officers to the Illinois Attorney General and because they engaged in other lawful speech and political activities of interest to the media and the public as well as members of the FOP Lodge 7, the defendant FOP Lodge 7 and defendant FOP of Illinois have unlawfully violated plaintiffs' rights under the First Amendment to express their views in matters of public concern and to petition a government agency such as the Illinois Attorney General to redress union

misconduct and to otherwise obtain a fair and honest union leadership.

62. By the acts set forth above and by barring plaintiffs from the union meetings and any contact with their union, the defendant FOP Lodge 7 and the FOP of Illinois have also acted unlawfully to deny plaintiffs the right to associate freely with other police officers for the purpose of collective bargaining and obtaining a fair and honest union leadership.

63. Plaintiffs have at all times complied with the reasonable rules and regulation of the FOP and cannot otherwise deal or bargain with the City of Chicago as to their wages, hours and working conditions except through the medium of a union which denies them membership.

64. Whether union officers obey state laws and provide truthful information about their compensation to state law enforcement authorities and file honest government reports is an important and legitimate matter of concern to the FOP membership and the public.

65. By the actions set forth above, and under Section 1983 of Title 42, and by continuing to require the City or Chicago to collect fair share from the plaintiffs but refusing to let plaintiffs be full members of FOP Lodge 7 or have any contact with the defendant FOP Lodge 7 while the City of Chicago continues to require plaintiffs to support it, the defendant FOP Lodge 7 and FOP of Illinois violated the rights of plaintiffs under the First Amendment to express their

views and political opinions about the conduct of union officers in a union they are obligated to support and to associate with other officers in matters affecting their wages, hours and working conditions.

WHEREFORE, plaintiffs pray this Court to:

A. Issue a preliminary injunction requiring defendant FOP Lodge 7 and the State Lodge to reinstate plaintiffs Hallinan and Harej as members in good standing pending the outcome of this action and bar defendant FOP Lodge 7 and FOP of Illinois from imposing any handicap or disqualification to plaintiffs' right to exercise any membership right or privilege as a result of the suspension or expulsion of plaintiffs;

B. Issue a permanent injunction requiring defendant FOP Lodge 7 and the FOP State Lodge to reinstate plaintiffs Hallinan and Harej as members in good standing and bar defendant FOP Lodge 7 and the FOP State Lodge from imposing any handicap or disqualification to plaintiffs' right to exercise hereafter any membership right or privilege as a result of the suspension of or expulsion of plaintiffs;

C. Grant plaintiffs compensatory and punitive damages from each defendant for their unlawful suspension or expulsion of membership;

E. Grant plaintiffs their legal fees and costs from defendants.

COUNT II

(Section 1983: Violation of Fourteenth Amendment)

66. Plaintiffs incorporate paragraphs 1 through 65 above.

67. By the actions set forth above, and under Section 1983 of Title 42, and by continuing to require the City of Chicago to collect financial support from the plaintiffs, the defendant FOP has a legal obligation not to bar plaintiffs from membership or gave any contact with it unless it complies with the due process and equal protection clauses of the Fourteenth Amendment.

68. Accordingly, defendant FOP may exclude plaintiffs if at all only for violation of the reasonable rules and regulations of the FOP Lodge 7 and in a manner that complies with basic norms of procedural due process and equal protection of the Fourteenth Amendment.

69. Plaintiffs have a right to a decision by an impartial or neutral tribunal as to whether they violated the union's reasonable rules and regulations.

70. Plaintiffs also have an equal right to be members of FOP Lodge 7 and to participate in fashioning the positions and policies of FOP Lodge 7 without any discrimination on the basis of any expression of their views or internal union political affiliations or other impermissible criteria.

71. As set forth above, to hear the charges against plaintiffs, defendants unlawfully established a panel that consisted of persons who were the political rivals of plaintiffs and who had an evident bias or were presumptively incapable of impartiality and fairness to them.

72. As set forth above, defendant FOP Lodge 7 & and the FOP of Illinois did not even purport to discipline plaintiffs for violation of reasonable rules and regulations but for activity that was clearly legitimate and even conferred a benefit on the union, namely, the exposure of false if not criminal conduct by such officers.

73. By the acts set forth above, and by expelling plaintiffs froth FOP Lodge 7 and denying them the right to a fair and impartial hearing as to whether they violated the reasonable rules and regulations of their union, defendants have violated the rights of plaintiffs to due process under the Fourteenth Amendment and have done so under color of law within the meaning of 42 U.S.C. § 1983.

WHEREFORE, plaintiffs pray this Court to:

A. Issue a preliminary injunction requiring defendants FOP Lodge 7 and the State FOP Lodge to reinstate plaintiffs as union members in good standing pending the outcome of this litigation;

B. Issue a permanent injunction requiring defendants FOP Lodge 7 and the State FOP Lodge to reinstate plaintiffs as union members in good

standing and correct and remove and expunge any disciplinary action taken against them;

C. Grant plaintiffs their compensatory and punitive damages against the individual defendant organizations for the violations of law set forth in this count;

D. Grant plaintiffs their legal fees and such other relief as may be appropriate.

COUNT III

(Denial of Associational Rights Under State Law)

74. Plaintiffs incorporate paragraphs 1 through 73 above.

75. The Constitution and By-laws of FOP Lodge 7 constitute a partly implied and partly express contract between the plaintiffs and FOP Lodge 7 and entitle plaintiffs to continue their membership in such organization unless they fail to follow the reasonable rules and regulations of such organization.

76. As members in good standing, plaintiffs have an implied contractual right not to be deprived of membership in FOP Lodge 7 unless it is determined by a fair and neutral process that plaintiffs have violated the reasonable rules and regulations of the FOP Lodge 7 as set out and contained in the Constitution and Bylaws of FOP Lodge 7.

77. By the acts set forth above and by denying a fair and impartial disciplinary procedure to plaintiffs and a fair and impartial tribunal to hear the charges against plaintiffs, both defendant organizations have unlawfully deprived plaintiffs of their contractual rights to such a fair and impartial process to determine if plaintiffs violated the reasonable rules and regulations of FOP Lodge 7.

WHEREFORE, plaintiffs pray this Court to:

A. Order that plaintiffs be reinstated as members of FOP Lodge 7 with no break in their continuous membership in good standing and with any reference to their suspension or expulsion removed from their records;

B. Grant plaintiffs compensatory and punitive damages against both the defendant organizations for the wrongful expulsion of plaintiffs from FOP Lodge 7 in a mariner that deprived them of their right to a fair and impartial determination that they violated the reasonable rules and regulations of the FOP Lodge 7;

C. Grant plaintiffs such other relief as may be appropriate.

COUNT IV

(Unfair Representation)

78. Plaintiffs incorporate paragraphs 1 through 77 above.

79. Under Illinois law, especially Section 9 of the Illinois Public Labor Relations Act, 5 ILCS §315/9, defendant FOP Lodge 7 has a legal duty derived from such statutory section to represent fairly all bargaining unit employees (including plaintiffs) and to offer them membership on fair, equal and non discriminatory terms.

80. While such bargaining unit employees are free to reject such offer of membership, the duty of fair representation inherently obligates FOP Lodge 7 to offer membership to any bargaining unit employee (including plaintiffs) provided that such bargaining unit employee is willing to abide by the reasonable rules and regulations of the organization.

81. Plaintiffs now and at all times have sought to be or to continue as members in good standing of FOP Lodge 7 and have at all times complied with the reasonable rules and regulations of the organization.

82. Under Illinois law and under the duty of fair representation imposed on FOP Lodge 7, the defendant FOP Lodge 7 has an obligation to extend membership on a fair, equal and non discriminatory basis to each and every bargaining unit employee willing to abide by the reasonable rules and regulations of such organization.

83. By the acts set forth above, and by denying them the right to be represented as members of FOP Lodge 7, and by using favoritism and malice and arbitrary criteria to determine which employees in the bargaining unit it chooses to represent as

members, and by other arbitrary and bad faith acts as set forth above, defendant FOP Lodge 7 has violated its duty under Illinois law to represent plaintiffs as members in good standing if they so desire and not to stigmatize or ostracize them in a subservient or non-member capacity against their wishes.

84. Furthermore, FOP of Illinois has participated and acted in aid of FOP Lodge 7 in violating the duty of fair representation to plaintiffs by failing to restore them membership on fair equal and non discriminatory terms.

WHEREFORE, plaintiffs pray this Court to:

A. Order the reinstatement of plaintiffs as members in good standing of FOP Lodge 7 and order the removal of any reference to their suspensions or expulsions from union membership in FOP Lodge 7 and otherwise restore their full rights of membership;

B. Grant plaintiffs compensatory and punitive damages for the violations of the duty of fair representation by FOP Lodge 7 and the FOP of Illinois;

C. Grant plaintiffs their legal fees and such other relief as may be appropriate.

BY: /s/ Thomas H. Geoghegan
THOMAS H. GEOGHEGAN
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PLAINTIFF'S EXHIBIT A

19 April 2005

Sidney M. Davis, Recording Secretary
FOP Chicago Lodge 7
1421 W. Washington Blvd.
Chicago, IL. 60607

After years of witnessing frivolous allegations and other actions that attempt to demean and repudiate the very existence of the Fraternal Order of Police and the ideals that this organization stand for, the below signed member brings forth these charges against Wayne Harej of Chicago Lodge #7.

I hereby charge Wayne Harej with violating that portion of the preamble of Lodge 7's Constitution and by-laws in that he has failed to "cultivate a spirit of fraternalism and mutual helpfulness among our members". He has also violated Article II, Sect. 2e of the Constitution in that he has "worked contrary to the interest . . . of the Fraternal Order of Police." Harej has violated Article II Sect. 2j in that he has deliberately interfered with officers and representatives of the National, State and Lodge 7 in the discharge of their duties. There have been numerous violations of Article II Sect. 2k of the Lodge 7's Constitution in that he has performed acts of insubordination against the authority of the Grand, State and Lodge 7 and has attempted to undermine the exclusive status of this organization.

Harej has committed these violations over a course of time which by his cumulative actions shows that his

intentions in these actions are a display of his belief that his membership in the FOP allows him to engage the Constitution and By-laws as a "sporting event" for his personal gratification. He has further gone outside of the organization in attempts to embarrass the organization and many members therein.

Following is a list of the actions that Harej has conducted in an attempt to foster his ambitions to discredit the objectives, operations and respect of the Fraternal Order of Police:

In May of 2000, he submitted a total of 18 C&B amendments to Lodge 7, most of which were determined by the C&B Committee to be unconstitutional. Harej appealed to the State FOP who ruled that they would allow, for various reasons, the local lodge ruling to stand. Harej appealed to the national FOP who granted Harej's appeal for a hearing at the National Conference in Phoenix in 2001. The National redirected the appeal back to the State Lodge with specific instructions. In fulfilling those instructions, the State Lodge tendered back to Lodge 7 those amendments that they felt Lodge 7 should place for a vote of the membership. In obliging these directions, Lodge 7 posted them in Sept. '02 Newsletter and prior to being submitted to the membership for a vote. Harej requested that they be pulled from consideration. In guaranteeing the rights of Member Harej, the Local, State and National Lodges of the FOP expended countless hours of work by countless members of all three Boards as well as an appreciable amount of Lodge finances during this

2 year endeavor only to have this member betray those efforts thus not cultivating a spirit of fraternalism and mutual helpfulness among our members. He has further deliberately interfered with those officers and representatives of the National, State and Local Lodge in discharging their duties by addressing his issues which were ultimately of little concern to him.

In August of 2000, Harej requested and was tendered copies of the Internal Revenue Service forms 990 for the years '97, '98 and '99. These forms were issued after a great deal of hesitancy as to what they would be used for. Shortly after tendering these documents, they were posted on a web site on the Internet in such a way as to attempt to portray the FOP Lodge 7 in a negative light. Harej later dared the Lodge Treasurer to file charges against him for being responsible for the posting. In 2001, in his unrelenting quest for sensitive Lodge documents, Harej requested the same forms for '99 and 2000. When he did not receive them in a timely manner, he threatened both the Lodge Treasurer and President with charges which later resulted in charges being filed against the Treasurer by Harej. The charges eventually resulted in an admonishment of Treasurer Barski.

On January 7th, 2002, Harej requested copies of the Illinois State Lodge's Form 990 returns for '98, '99 and 2000 which were tendered by State Secretary Mike Virale. Being cognizant of the distribution of the identical documents that were tendered to Harej by

Chicago Lodge 7, there were instructions included that the documents contain sensitive information about our organization and that Harej is prohibited from copying and/or distributing them to other persons or organizations.

In January of 2001, Harej filed charges against then President Bill Nolan alleging that Nolan took action at a Board Meeting that did not abide by the guidelines found in Roberts Rules of Order. Harej as a result of his feeling that the committee appointed to hear the charges was not unbiased, filed charges against then 1st VP Bob Podgomy. The charge was dismissed by a panel at Lodge 7 and Harej then appealed the finding to the State Lodge. The State Grievance Committee who heard the appeal of Harej on the allegations against Podgomy ruled against the position taken by Harej who then wrote a letter to Grievance Chairman Keith Turney accusing the Chairman, in the handling of his case, as being: a disgrace; an embarrassment; unprofessional and unethical. In response, Chairman Turney wrote that if "I am to fall victim in a similar fashion as others who you feel have wronged you . . . I am sure, that ultimately there will be no one left who you feel can impartially address your needs and that is unfortunate." This renting by Harej was clearly an act of insubordination against the authority of a State Lodge Officer. Due to the fact that Harej disagreed with actions taken at a Board Meeting, he attempted to interject his opinions while at the same time attempted to interfere with officers of the State and

Local Lodges in the discharge of their duties and in so doing, worked contrary to the interests of the Fraternal Order of Police.

In furtherance of his actions toward the authority of the State Lodge, Harej, on the same day as the Committee Hearing and State Lodge Board Meeting [December 7, 2001], requested copies of the tapes of both meetings. His letter further referenced the fact that Harej was informed by then President Donahue as to when his appeal could be made up to the full board which was after the Committee Report and prior to the Board vote. Harej sat through the report and did not stand to be heard. When the Secretary Virale informed Harej that he could not have nor listen to tapes of the proceedings, but that copies of the Minutes are available to him, Harej wrote to then National Secretary Jerry Atnip. In that letter he stated that his requests were being delayed due to his attempt to file charges against then State President Donahue for failing to represent a member [him]. Although Harej never filed charges against Donahue, he sought assistance from the National Office in this matter. Secretary Atnip replied that he researched his complaint and that no violation had occurred and that he found no evidence that State Lodge officers attempted to prevent him from obtaining minutes. These actions have caused numerous State and National Officers to address these issues of concern for Harej which interfered with the discharge of their normal duties.

In June of 2001, Harej filed an appeal with the Illinois State Lodge due to Constitution and By-law amendments, filed by him, being rejected by Lodge 7 based upon the fact that they weren't tendered in resolution form as is required in Lodge 7's C&B. Prior to the State Lodge considering his appeal, Harej filed a complaint with the Illinois Labor Relations board [20 Sept. 01] which was dismissed by the Board. The ILRB dismissed the charges as they were "internal matters". Following this dismissal Harej "demanded" of the Illinois Labor Relations board a full hearing on the charges contained in his appeal which was as well dismissed. These actions again point to the lack of regard that Harej has for the organization and its decision making process which fails to cultivate a spirit of fraternalism and mutual helpfulness among our members and clearly shows an attempt to undermine the exclusive status of the organization.

In October of 2001, Harej filed charges against Lodge 7 over the issue of C&B votes administered by the Lodge. Although no member was specifically charged, the Lodge determined the Chair of the C&B committee be named. John Carey was charged in that he sent out C&B's to all members, although Harej thought they should not have gone to retired members. The Panel hearing his case determined that Carey was following the C&B's and that he did not violate same. This is yet another incident when a committee disagrees with Harej and finds themselves facing charges which does nothing to "cultivate a spirit of

fraternalism and mutual helpfulness among our members".

In October of 2002, Harej attempted to get membership to support a candidate running in a State wide race which was contrary to the endorsement that was made by the Illinois State Lodge whose authority it is to endorse in state wide races. Harej contends that the choice of the membership of Lodge 7 wasn't properly tendered to their State Trustee although the minutes of the State Meeting at which the vote was taken reflects that one trustee voted to not adopt the recommendation for a Madigan endorsement, that lone vote was that of District 1 Trustee Pat Duckhorn. Through a series of postings on a web site on the internet, Harej attempted to challenge the endorsement given by the State Lodge. In one posting on October 28, '02, Harej claims that then Lodge 7 President Donahue endorsed Madigan which would have been a violation of the State Policy and Harej should have filed the appropriate charges. Harej opted not to do so but continued to post on the site that violations had occurred bringing disrepute to the organization and its endorsement processes, which undeniably works contrary to the interests of the Fraternal Order of Police.

On December 18, '02 Harej challenged the interpretation of By-laws Article II and felt that 2nd V.P. Frank DiMaria had violated it in that he denied Harej's request for the results of a hearing which referenced charges that he brought against Nolan and Burke. In that challenge he requested that

President Donahue direct DiMaria to comply with his interpretation of the C&B of Lodge 7. In response it was pointed out that if Harej felt DiMaria had violated the C&B of Lodge 7, then he should have filed the appropriate charge[s] which was not done. His correspondence was yet another attempt to impugn the dignity and reputation of the Lodge and its officers based upon his opinion.

On June 25th 2004 Harej filed a grievance with the State Lodge over his C&B amendment proposals to Lodge 7 which were denied as the local C&B Committee had refused them based on the submitter's failure to properly submit them. A Hearing at the Illinois State conference over Harej's grievance was held in which Harej was told that if the presentation that was made at that hearing had been originally made to the Lodge 7 C&B Committee, a grievance most likely would not be necessary. At issue was the fact that Harej submitted a signature page to the State that included the printed names of the signatures, something the Local Committee could not verify due to illegibility. Harej was advised to resubmit at the proper time in Lodge 7 in a like manner that had been submitted to the State at his hearing. Due to the fact that Harej had submitted proposals in the past with an identifying page for the signatures, his error in not doing so was the cause of his debacle and not the actions of the Local C&B Committee. His filing a grievance with the State was an act of insubordination towards the Local Lodge in that he failed to accept responsibility for his error.

On January 6, 2005, Harej requested an investigation be conducted by the Attorney General's Office of the State of Illinois over a "Illinois Charitable Organization Annual Report", a required filing by FOP Lodge 7, in which he alleges that the amounts entered were not correct due to a newspaper report that identified the salary of the Office of President at a rate higher than that reported on his report. Even though Harej was well aware of the salary of the President of Lodge 7 as he had made C&B proposals to change same, he opted to take this internal issue of the Lodge to the office of the Attorney General in an apparent attempt to embarrass the Lodge and an officer therein. This action was contrary to the interest of the Fraternal Order of Police in that the Lodge works closely with the AG's office and in fact has an AG Lodge in the Fraternal Order of Police.

In January and February of 2005, Harej has again gone to the Illinois Labor Relations Board with allegations of impropriety conducted on the parts of President Mark Donahue and 1st VP. Bill Dougherty. These actions have precipitated any actions at the disposal of Harej at the Local Lodge level which he has an obligation to as a member to enact as reflected in Article II, Sect. 8 of Lodge 7's By-laws. Instead Harej has again chosen to go outside of the organizations and its C&B's and to seek alternate action to discredit the Order and to attempt to embarrass the organization and its members which has worked contrary to the interest of the Fraternal Order of Police.

Sometime prior to January 23rd, 2005, Harej along with member Shawn Hallinan contacted a reporter for the Sun-Times, Frank Main, and informed Frank Main that he was a candidate for office in the upcoming elections and that officers should be getting more benefits. Harej was quoted "there is a problem when approximately $2 of every $10 donated to Chicago Lodge 7 is available for the needs of our police". A similar story appeared in the Tribune that assets that Wayne Harej has filed complaints with the Illinois Attorney General and the Illinois Labor Relations Board alleging that Donahue has filed erroneous reports with the State underestimating his income. These allegations besmirch the reputations of both Lodge 7 and its President. Again with little concern for a factual basis, Harej has again gone outside of the organization for strictly political purposes attempting to embarrass the Lodge and its officers. If there was any truth, the appropriate charges should also be lodged against a number of officers in Lodge 7 as there are several who have oversight over Lodge finances and filings.

On March 23, 2005 Harej filed a charge with the Illinois Labor Relations Board in which he makes allegations that he knows are incorrect and does so even though there is a procedure available to him within the organization to appeal an action taken in regards to a grievance filed by him. A settlement agreement with the City was voted on by the Grievance Committee but has not been accepted pending Harej's confirmation of such. He has an

opportunity to address the Grievance Committee as was spelled out to him in the letter he received prior to filing with the Labor Board. Again, prior to his appeals process being over, Harej has taken internal Union Business and lodged a complaint with the Labor Board discrediting the efforts that were provided him from the Lodge. On doing so he has worked contrary to the interests of the FOP and has deliberately interfered with officers and representatives of Lodge 7.

Harej had an obligation under Article II Section 8 of the By-laws to file specific written charges with the Recording Secretary if he had knowledge of any member engaging in actions or inactions which would constitute a violation of the C&B of the Lodge. On 20 Sept. 2001, 6 Jan 2005, 25 Jan 2005, 4 Feb 2005 and 22 March 2005 he went to state agencies with allegations of misconduct against the Lodge and its officers instead of first initiating internal changes with the Lodge's Recording Secretary.

It is the cumulative efforts of Wayne Harej reflected above that we take issue with his attempts to damage the reputation of the Fraternal Order of Police at the remote possibility that any officer or Lodge would dare disagree with a position taken by him. State Lodge 2nd VP Keith Turney summed it up well by his reference that there will be "nobody left to hear his pleas once he has destroyed them all." His further quest to embarrass the Lodge and its members for purely selfish and political reasons provides testimony to the fact that his cumulative actions are nothing

more than a game being forced upon the organization by this member and the time has come to stop playing this game and to free up those energies wasted on his game plan for the benefit of all the members and law enforcement as well.

It is with deep regret that any member need be considered for expulsion from this great organization, but the actions of this one individual in causing the needless expenditures of time and money at all three levels of the FOP certainly warrants this serious consideration. Therefore we ask that the Trial Panel hearing these charges agree with these allegations and recommend to the Board of Directors of Lodge 7 to expel Wayne Harej from the Fraternal Order of Police due to his endless attempts to discredit the integrity and ultimately destroy the good name of this organization.

Fraternally submitted,

/s/ Greg Bella
Greg Bella

PLAINTIFF'S EXHIBIT B

19 April 2005

Sidney M. Davis, Recording Secretary
FOP Chicago Lodge 7
1421 W. Washington Blvd.
Chicago, IL. 60607

The undersigned has found it necessary to bring charges against Shawn Hallinan in that he has

brought disrepute against the Fraternal Order of Police Chicago Lodge 7 and it's officers. Hallinan has violated that portion of the "preamble" of Lodge 7's Constitution and By-laws in that he has failed to "cultivate a spirit of Fraternalism and mutual helpfulness among our members." He has also violated Article II Section 8 of the By-laws in that he claimed to possess information that a member of this Lodge has engaged in actions or inactions which would constitute a violation of the Constitution and By-laws of this Lodge and failed to file specific written charges against the member with the Recording Secretary.

Hallinan contacted Chicago Sun Times reporter Frank Main and criticized the actions of Donahue and the Lodge in failing to get a new contract in a timely manner to replace the one that had expired in June of 2003. Hallinan further questioned in the media, why the President's salary was listed as $53,000 in a state charitable organization report. This question should have been directed to the Lodge and an unacceptable response should have warranted charges to be brought forward to the recording Secretary of the Lodge as is called for in the C&B of the Lodge. This action has brought disrepute to the Lodge, its members and officers.

Hallinan also contacted Chicago Tribune reporter David Heinzman with allegations that President Mark Donahue has overseen sloppy management of the union's funds and that complaints were filed with the Illinois Attorney General and the Illinois Labor

Relations Board that President Donahue has filed erroneous reports with the State understating his income. This allegation demeans the position of the Board, of which Hallinan was a member, which has responsibility for the oversight of all Lodge actions. This contact and allegation also violates Article II section 8 of the By-laws in that Hallinan should have directed these allegations to the Recording Secretary of the Lodge in written form for charging.

Both of these incidents were taken as a result of Hallinan filing to run against President Donahue in the upcoming elections and were done to discredit the Lodge, President Donahue and Lodge Members in an obvious effort to foster Hallinan's election. These actions caused distress to the Lodge and its members in that it the ensuing time frame the conduct of the Lodge and its officers, particularly President Donahue were questioned on numerous occasions relative to the allegations published in both major Chicago Newspapers which continues to fail to cultivate a spirit of Fraternalism and mutual helpfulness among our members.

As Hallinan was a Trustee on the Board of Directors, he was duly sworn in to said position by then National President Steve Young. Hallinan identified himself as a Board Member when he contacted Reporter Heinzman, giving a semblance of validity to his allegations. In his oath, in part, Hallinan swore to: comply with all the laws and rules of this Order; abide by and support the Constitution and By-laws of this Order; be fair in all his dealings with this Lodge

and that he will not use the authority invested in him for personal gain, or for any other cause, except for the best interests and welfare of this Lodge and its members. Hallinan continued in his oath that "should I violate this, my solemn oath and obligation, I hereby bind myself under no less a penalty than that of being impeached from office and expelled from the order. To all of which I solemnly promise an swear, so help me God, and keep me steadfast."

Hallinan's actions in contacting the media to foster his campaign for political office, is a violation of the oath he voluntarily took and in his last allegation, the Lodge is bound to exert the discipline called for in the Ritual Book, that of being expelled from the order.

Respectfully submitted,

/s/ Timothy Fallon
Timothy Fallon

Supreme Court, U.S.
FILED
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No. 09-373

In The Supreme Court of the United States

SHAWN HALLINAN and WAYNE HAREJ,

Petitioners,

v.

FRATERNAL ORDER OF POLICE CHICAGO LODGE 7 and FRATERNAL ORDER OF POLICE ILLINOIS STATE LODGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents would restate the questions differently, as set forth below:

1. Does a union representing public sector employees pursuant to state statute act under color of state law when it expels individuals from membership pursuant to the provisions of the union's constitution and by-laws?

2. Whether public sector employees required by a collective bargaining agreement to pay "fair share" representational fees to a union, and required by state law to bargain with the employer over wages, hours and conditions of employment through the union, necessarily have the right under the Constitution to be members of that union if they obey its reasonable rules and regulations.

3. Whether public sector employees can assert a claim for violations of their First and Fourteenth Amendment rights against a union in the absence of a remedy under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* (LMRDA).

CORPORATE DISCLOSURE STATEMENT

The Respondents are non-profit fraternal associations pursuant to Section 501(c)(8) of the Internal Revenue Code, 26 U.S.C. § 501(c)(8), and they are affiliated with the National Lodge of the Fraternal Order of Police.

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CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

There are five additional statutory provisions, not listed by the Petitioners, that are relevant to this Court's decision.

Illinois Public Labor Relations Act, 5 ILCS 315/10(b)(1)

It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce public employees in the exercise of rights guaranteed in this act, provided,

(i) that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein or the determination of fair share payments and

(ii) that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act;. . . .

Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(e)

"Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce,

an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(i)

"Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5)

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

This case principally involves the question of whether a private labor organization's actions, in expelling members from the organization, constitute state action such that First and Fourteenth Amendment

rights must be guaranteed in the expulsion. Respondents concur with the Petitioners' statement of the factual and procedural history of this case to the extent that its statement of facts merely reflects allegations made in the complaint and to the extent that the explanation of the procedural history of the case is factual as opposed to argumentative. Respondents dispute many of the allegations made in the complaint below, but given that this case was ruled upon on a motion to dismiss, Respondents accept that all facts alleged in the complaint are deemed true for the purposes of resolution of this case.[1]

Despite their statements to the contrary, the Petitioners are contending that there is a constitutional right to become members, as opposed to fair share fee payers, of the labor organization that represents them for collective bargaining purposes. It is their belief that, since, as public employees, their union is excluded from the provisions of the Labor-Management Reporting and Disclosure Act (LMRDA) concerning the due process rights of members, this Court is required to create for them such a federal right through the First and Fourteenth Amendments. They seek this, despite the fact that their union is a purely private entity, which, when disciplining or

[1] In its petition, the Petitioners state that officers on the board of Respondent Fraternal Order of Police Illinois State Lodge had campaigned against the Petitioners. Pet. 6. That allegation was not plead in the complaint.

expelling members, acts solely pursuant to its own internal constitution and by-laws.

In deciding to expel the Petitioners, the Respondents are not state actors, and thus cannot be guilty of such constitutional violations. The Petitioners do not, in this case, challenge the Respondents' receipt of fair share fees, taken pursuant to state law, or the State of Illinois' recognition of Lodge 7 as the Petitioners' exclusive collective bargaining representative. They instead contest only the Respondents' expulsion of them from membership in the union, a matter that is not governed by federal or state statutes. As the Court of Appeals aptly reasoned:

> To sum up, the plaintiffs are certainly correct that when a government employer forces its employees to join a union it is imposing on associational rights. The plaintiffs argue that this is the mirror image of such a forced association case – "a reverse fair-share case" as they put it. But the reverse case of an *employer forcing* an employee to join a union is the case where the *employer prohibits* its employees from associating with a union. Clearly this too would constitute a violation of First Amendment associational rights, but it is not what happened here. Here, it was the Union, rather than the employer, that barred the plaintiffs from membership. And union actions taken pursuant to the organization's own internal governing rules and regulations are not state actions. [Citations omitted.] [Emphasis in original.] Pet. App. 10-11.

In its reliance on Illinois' regulation of collective bargaining between public sector employers and unions in the Illinois Public Labor Relations Act (IPLRA), the Petitioners seek to make every action of such unions "state actions." But to do so here, where the IPLRA does not govern unions' rights to discipline or expel members, and, indeed, expressly excludes from its jurisdiction internal union matters, would turn conventional constitutional law on its head. If unions are to be state actors in their internal affairs simply by virtue of the fact that they are certified or recognized as exclusive employee representatives, then every private entity that is touched by state or federal law – including every corporate entity in this country – must be deemed state actors in every act that they undertake. Neither the Constitution nor the courts require such a conclusion in other circumstances and, as such, should not make a private entity a state actor in this case.

REASONS FOR DENYING THE WRIT

A. The IPLRA's Regulation of Collective Bargaining with Public Employers Does Not Imbue Public Sector Unions with State Authority in Matters of Internal Union Governance

1. Expulsion from the Union Is a Private Matter

The Court of Appeals properly held that the Petitioners' claims should be dismissed for failure to plead state action, which is a fundamental requirement for jurisdiction under 42 U.S.C. § 1983. The law of that circuit is clear that, in general, unions are not state actors. *Wegscheid v. Local Union 2911*, 117 F.3d 986, 988 (7th Cir. 1997). Thus, their internal governing rules and internal constitutions are not subject to First Amendment prohibitions. *Messman v. Helmke*, 133 F.3d 1042, 1044-45 (7th Cir. 1997); *see also*, *United States v. International Brotherhood of Teamsters*, 941 F.2d 1292, 1296 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992) (holding that actions taken pursuant to a union's constitution were private actions not subject to § 1983).

Petitioners fail to explain how state action exists in the Respondents' decision to expel them from Lodge 7, instead relying upon an inference that because the State of Illinois has legislated in the area of collective bargaining generally, and because Lodge 7 has developed a collective bargaining relationship with the City of Chicago specifically, then every

action of the Respondent unions must constitute action on behalf of the state and/or City. In this respect, the instant case is analogous to a number of cases decided by the courts where a state actor was merely peripherally involved in an otherwise purely private action. In such situations, one cannot make the logical leap that regulation of one aspect of an entity's actions make that entity a state actor.

One such case is *Driscoll v. International Union of Operating Engineers, Local 139*, 484 F.2d 682 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). There, the Court of Appeals for the Seventh Circuit reasoned that, to be regulated under Section 1983 and its related constitutional provisions, the very activity of a private entity which a plaintiff challenges must be supported by state action. *Id.* at 690. In that case, the plaintiff had instituted an action against the defendant union which alleged that the union's practice of requiring all candidates for union office to execute a non-Communist affidavit and the union's refusal to place him on the slate for executive office violated his First and Fifth Amendment rights. *Id.* at 689-90. In dismissing the claims for lack of state action, the court held that governmental regulation or participation in some of the affairs of unions does not make every union activity subject to constitutional restraints. *Id.* at 690. Rather, to be subject to constitutional standards, " . . . the very activity of a private entity which the plaintiff challenges must be supported by state action that significantly fosters or encourages that activity." *Id.* The plaintiff's claim

ultimately failed because he was unable to demonstrate that any governmental activity "significantly encouraged" the union in its promulgation and enforcement of the anti-Communist oath. *Id.* at 690-91.

Several years later, this Court decided *Blum v. Yaretsky*, 457 U.S. 991 (1982), in which the issue was whether Medicaid recipients were able to establish state action in nursing homes' decisions to transfer them to a lower level of care. There, the private nursing homes independently decided that the plaintiffs did not need the care that they were receiving from the homes and that they could be transferred to a lower level of care. *Blum*, 457 U.S. at 995. The homes then notified the city officials, who were responsible for administering the Medicaid program for the city, of the decision to transfer the patients. *Id.* After receiving the information, the city prepared to reduce or terminate payments to the nursing home for the plaintiffs' care and, following an administrative hearing, social service officials affirmed the decision to discontinue benefits unless the plaintiffs transferred to a facility with a reduced level of care. *Id.* This Court found that there was no state action to support the plaintiffs' Fourteenth Amendment claims, reasoning that the action being challenged (i.e., the transfer to a lower level of care) was undertaken by the nursing homes, which were clearly private entities. *Id.* at 1005. The Court concluded:

> Respondents, however, do not challenge the adjustment of benefits, but the discharge or

> transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which the respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced to any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Id. [Emphasis in original.] *See also, Broderick v. Associated Hospital Service*, 536 F.2d 1 (3rd Cir. 1976) (holding that state regulation requiring approval by state agency of health care contracts and subscriber rates was insufficient to confer state action on determinations made by private insurance companies).

Other cases followed the reasoning in *Blum v. Yaretsky*, one of which concerned the internal affairs of unions and possessed a strikingly similar fact pattern to that posed here. In *United States v. International Brotherhood of Teamsters*, 941 F.2d 1292, 1296 (2nd Cir. 1991), the plaintiffs were expelled from membership in the Teamsters' union and otherwise sanctioned by an Independent Administrator (IA), a position created by a consent decree issued by the U.S. courts. The Plaintiffs alleged that the creation of the IA in and of itself was sufficient to demonstrate state action. This argument was rejected by the court, as follows:

> Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes 'state action.' *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1002, 73 L.Ed.2d 534 (1982). To qualify as state action, the conduct in question 'must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' and 'the party charged with the [conduct] must be a person who may fairly be said to be a state actor.' *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 73 L.Ed.2d 482 (1982). The IA's imposition of sanctions on [the Plaintiffs] meets neither of these criteria.

Id. at 1295-96. The court found that in issuing the sanctions against the Plaintiffs, the IA acted pursuant to the union's constitution – a private agreement – and not pursuant to a "right or privilege created by the State." In addition, the court found that despite the fact that the IA was a quasi-governmental actor, the plaintiffs were unable to establish that the IA " . . . may fairly be said to be a state actor." That was because the state itself, while involved in the creation of the IA position, was not involved in the activity that caused the alleged injury – the issuance of sanctions. *Id. See also, Leahy v. Board of Trustees of Community College District No. 508*, 912 F.2d 917, 921 (7th Cir. 1990) (finding that internal union

decision not to pursue member's grievance did not implicate a constitutional violation without "facts which . . . would show that the Union, a private entity, was acting under color of state law. . . .").

Here, the Petitioners seek a finding that the Respondents' expulsion of them from Lodge 7 violates the First and Fourteenth Amendments. By the Petitioners' own admissions, it was Lodge 7 which instituted union disciplinary charges against the Petitioners. It was likewise Lodge 7 which undertook proceedings pursuant to its internal constitution and by-laws to expel the Petitioners from the union and ultimately achieved that result. Neither the City of Chicago, the State of Illinois, nor any other state actor was utilized in those proceedings or involved in achieving that result. And no federal law, state law or municipal ordinance governs the issue.

2. This Court's Prior Union Shop and Fair Share Cases Are Inapposite to this Case

Nevertheless, the Petitioners plead with this Court to find state action despite the clear court precedent to the contrary. First, they claim that state action exists through the IPLRA's "union shop" provision. Petitioners attempt to analogize *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976), and *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), to the instant matter, contending that the existence of a fair share arrangement between a union and public employer – or the State of Illinois'

legislation in the area of the payment of fair share fees – somehow imbues the union with state authority. Had the Petitioners filed this suit to challenge the state's requirement that they financially contribute to Lodge 7 they would be correct in this assertion; conversely, their reliance on those cases is misplaced here because the underlying conduct that Petitioners are protesting is their expulsion from the union, not a collection of fees for the union. It is without question that state law was not relied upon in expelling the Petitioners from Lodge 7. Rather, the sole basis for the expulsion and the process by which Petitioners were expelled was Lodge 7's private constitution and by-laws. It is further evident that the act for which they seek a remedy is their expulsion from Lodge 7, not the deduction of fair share fees. In fact, the crux of Petitioners' claim is that, as a result of their expulsion from Lodge 7, they were improperly denied the right to pay more money to that entity. In fact, even if the state were to repeal the IPLRA provision regarding fair share fees, the Petitioners would not become members of Lodge 7, because the state has absolutely no control over – and has not attempted to exert control over – the matter of whom unions accept as members.

It is for this reason that the cases principally relied upon by the Plaintiffs – *Abood v. Detroit Board of Education* and *Railway Employes' Dept. v. Hanson* – are inapposite. In each of those cases, state action was present because the underlying conduct being challenged resulted from specific contractual provisions

between the employer and union, respectively the taking of dues (*Abood*) and the implementation of a union shop (*Hanson*). Such findings are consistent with cases such as *Driscoll v. International Union of Operating Engineers, Local 139*, 484 F.2d 682 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974), where the Court of Appeals reiterated that to be subject to constitutional scrutiny the very activity of a private entity which a plaintiff challenges must be supported by state action. *Id.* at 690. There is simply no reasoning in *Abood* or *Hanson* that permits the sweeping generalization that all unions which have fair share fee arrangements with public employers become state actors for all purposes, including the expulsion of members.

The Petitioners' expulsion from Lodge 7 was undertaken pursuant to the Respondents' constitution and by-laws, which are wholly independent of state law. The position that the Petitioners take is that because a state action might be present with respect to the process designed for deducting fair share fees, then every other action of the Respondents is, therefore, also state action. That cannot be the case. Such a determination would undermine the distinction between public and private actors that was intended for constitutional claims and would be contrary to established law. Under the Petitioners' theory, unions which represent public sector employees would become state actors in every action that they undertake, not only those which are undertaken with the imprimatur of state or federal law, but

all actions taken outside the scope of collective bargaining.

The Petitioners further contend that state action exists in this case because state law grants Lodge 7 the exclusive authority to engage in collective bargaining with the City over its police officers' terms and conditions of employment. They assert that because Lodge 7 is the exclusive bargaining representative of municipal employees pursuant to state collective bargaining law (i.e., the IPLRA), the union is operating under a state-conferred "monopoly." Therefore, the Petitioners reason, the conduct of Lodge 7 is subject to constitutional scrutiny. The IPLRA, however, does not govern internal union matters such as leadership elections or discipline of members. Further, there is no monopoly with respect to public sector employees' selection of a collective bargaining representative. As noted by the Petitioners, the IPLRA allows a labor organization to become the exclusive bargaining representative of an appropriate unit of employees by majority vote (either by secret ballot or a card check process). What they fail to mention is that there is also a procedure through which employees can decertify a labor organization and through which these employees can change their bargaining representative if they are dissatisfied with the representation provided by the Respondents. 5 ILCS 315/9(a). As a result of such a process, a union cannot maintain a monopoly as the representative of Chicago's police officers. Moreover, pursuant to that statute, Lodge 7 has a continuing

duty to fairly represent the Petitioners in the negotiation of their terms and conditions of employment, whether or not they remain members of the union. 5 ILCS 315/10(b)(1). Thus, any assertion on the part of the Petitioners that their employment would be compromised by their expulsion from Lodge 7 is meritless.

The IPLRA also specifically excludes internal union matters from its jurisdiction. While it does provide for unfair labor practices on the part of labor organizations, it clearly exempts labor organizations' rules and actions regarding acquisition and retention of membership. 5 ILCS 315/10(b)(1). The State has chosen not to regulate unions' internal decision making with respect to membership, be it the basis for expelling a member or the means used for expulsion. Thus, the State's "action" with respect to internal union affairs can best be described as inaction – a legislative decision not to intervene in such matters. The State of Illinois' unwillingness to legislate the public sector unions in the same manner as that of the LMRDA over private sector unions does not support a finding of state action in this case. *See American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 53-4 (1999).

A state's mere grant of exclusive representative status to a union is likewise insufficient to make every act of Lodge 7 subject to constitutional scrutiny. A similar argument was raised in *Leahy v. Board of Trustees* when the plaintiff posited that state action was present because City Colleges delegated its

authority over conditions of employment to the employees' union through the collective bargaining process. *Leahy*, 912 F.2d at 920. The Court of Appeals rejected that argument in *Leahy,* and this Court should continue to reject such arguments here.

Moreover, cases outside of the labor context have similarly rejected the Petitioners' "monopoly" theory. The basis for rejecting such arguments was best articulated in *San Francisco Arts and Athletics Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). That case involved an arts organization's attempt to use the word "Olympic" in a program of an athletic nature bearing the title Golden Gate Olympic Association. The United States Olympic Committee (USOC) had, by Congressional action, obtained the exclusive right to use the word "Olympic." 483 U.S. at 526. The arts organization claimed that the USOC enforced its right to use the name "Olympic" in a discriminatory manner, and the issue presented was whether the USOC is a governmental actor to which the prohibitions of the Constitution apply. *Id.* at 527. The Court, citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), held:

> The fact that Congress granted it a corporate charter does not render the USOC a Government Agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by government does not transform

> the actions of their regulated entity into those of the government.

483 U.S. at 543-4. Nor was the fact that Congress had granted the USOC exclusive use of the word "Olympic" sufficient to create state action. *Id.* at 544.

It has also long been the position of this Court that the existence of state regulation on a matter, even the existence of state regulation that is "extensive and detailed," will not convert a private entity's action pursuant to the state regulation to state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350). In *Rendell-Baker*, the plaintiff, a counselor at a private school, alleged that the school had violated her rights under the First, Fifth and Fourteenth Amendments when it discharged her. 419 U.S. at 834-5. Many of the school's functions were extensively regulated by state law. *Id.* at 832-3. The Court, relying on the precedent established in *Blum v. Yaretsky* and *Jackson v. Metropolitan Edison Co.*, rejected the plaintiff's claim that the extensive regulation of the school's actions by the state converted the otherwise private school into a state actor for the purposes of discharging the plaintiff. *Id.* at 841-2. Specifically, the Court concluded that the decision by the school to discharge the plaintiff was not "compelled or even influenced" by any state regulation and that, while there was extensive regulation of the school generally, the various regulators did not involve themselves in any significant way in the school's personnel matters. *Id.* The regulation was

therefore insufficient to make the decision to discharge the plaintiff, made by private management, state action. *Id.* at 842.

The instant case is analogous to that in *Rendell-Baker*. Here, admittedly, there is state regulation concerning public sector collective bargaining. It might even be considered by some to be extensive and detailed. Yet, there is a complete absence of state regulation of the internal union affairs of public sector unions. The decision of Lodge 7 to expel the Plaintiffs – indeed, the decision of Lodge 7 to expel any member – is not governed by any regulation other than the Respondents' internal constitution and by-laws, which are neither influenced nor compelled by the State, the City of Chicago, or any other governmental entity. Like in *Rendell-Baker*, there is here no state regulation that governs the expulsion of union members, let alone a state regulation that compels or influences expulsion decisions. The same is true with respect to *San Francisco Arts and Athletics Inc.* The fact that Lodge 7 has an exclusive representative status for purposes of collective bargaining negotiations does not make it a state actor, in the same manner that the USOC's exclusive status and grant of a monopolistic right to use the Olympic symbols did not make it a state actor. Based upon this precedent, one cannot conclude that Lodge 7's alleged "monopoly" over collective bargaining with the City of Chicago makes it a state actor when it decides to expel a member.

B. The Petitioners Cannot Assert Constitutional Rights Simply on the Basis that No Federal or State Law Provides an Adequate Remedy

The Petitioners appear to argue that they must be allowed to proceed with their constitutional claims because Illinois does not have a "state" equivalent to the LMRDA, and the LMRDA does not cover them. The premise being that if they cannot proceed under the First and Fourteenth Amendments, then there is no relief for them at all. But such matters do not eliminate the need for state action in constitutional claims and are not appropriately remedied in this fashion. As enunciated by this Court, "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287 (1981). The wisdom, fairness, and policy of statutes are the business of the legislature, not the courts. *Reeder v. Kansas City Bd. of Police Com'rs*, 796 F.2d 1050, 1055 (8th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *see also*, *Harper v. U.S. Seafoods LP*, 278 F.3d 971, 976 (9th Cir. 2002), *cert. denied*, 537 U.S. 879 (2002) (courts are not free to rewrite laws simply because a result seems unfair in a particular case).

The Petitioners suggest that this Court institute, under the guise of First or Fourteenth Amendment interpretation, a state law equivalent to the LMRDA where none actually exists in fact. Respectfully, to do

so would usurp the proper role of the Illinois legislature. When drafting the IPLRA, it expressly excluded from the state's regulation the internal affairs of unions. Likewise, when drafting the LMRDA, Congress excluded public sector unions from its coverage. The fact that these legislatures chose not to regulate the internal affairs of the Respondents and like labor organizations does not compel this Court to create a legal remedy for Petitioners through the Constitution, as the Petitioners claim. Rather, their inaction is an express limit on the Petitioners' right to challenge their expulsion from the union in the courts and should be recognized as such in this case.

CONCLUSION

This case is not what the Petitioners' arguments imply. It is not a challenge to Illinois' law concerning the certification or recognition of collective bargaining units; it is not a challenge to state legislation regulating the collection of union dues or the creation of a "union shop." It is, instead, a claim by the Petitioners that the Respondent unions violated their Constitutional rights by expelling them from membership in the union. As the Respondents did not act under color of state law when doing so, the Petitioners' claims were properly dismissed by the trial

court. The Respondents thus respectfully request that this Court deny the Petitioners' petition for *certiorari*.

Respectfully submitted,

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